

THE TRIALS OF MEN
sexuality and socio-legal politics

by
Peter Rush

Centre for Criminology and the Social and Philosophical Study of Law,
Faculty of Law,
University of Edinburgh,

1992



To Alison
this body, this paper, this fire.

TABLE OF CONTENTS

Abstract	iv
Acknowledgements	vii
Chapter 1:	
Narration and Emasculation: the ligatures of law	1
Chapter 2:	
Familiar, All-Too-Familiar: incestuous stories of masculine desire	39
Chapter 3:	
The Obscenity of Socio-Legal Reason: off-stage and masculine	102
Chapter 4:	
The Revision of Sodomitical Law: 1967 and "homosexual acts"	174
Select Bibliography	274

ABSTRACT

Michel Foucault wrote that modern politics puts man's existence in question. Rather than using man in its generic sense, this thesis describes and analyses the ways in which it has been demanded that men put their masculine sexuality in question. This demand and the various responses to it are traced, not at a general level, but by way of several in-depth studies of particular problematisations in contemporary sexual politics.

The studies are prefaced by an initial chapter. It describes the emergence of men's groups, the inscription of their discourse by the law of narrative in the academic genre of men's studies, and the parallel refusal of narrative meaning by an anti-representational genre of male feminist criticism. As such, the chapter functions to provide a context for analysis of the law of masculinity and sexual difference in the subsequent chapters. At the same time, it introduces in more general terms the debates and theoretical resources that inform the thesis. The resources are primarily post-structuralist - and in particular, the ways in which it radicalises the implications of a general theory of language for the human sciences. The "sciences" which provide the thesis with its privileged interlocutors are feminism, psychoanalysis, queer theory and legal theory.

Each of the subsequent essays are however not designed as illustrations of a post-structuralist approach. Rather, they are essays

which attempt to contribute to the analysis of the intersections of law and sexual politics. In this respect, discrete problematisations are addressed in depth. Chapter 2 is concerned with the cultural debates on incest and child sexual abuse. It begins by setting out the mythical structure of the debates in such a way as to display how the debates produce the resources which prevent them from stabilising itself at the interpretive level. The second move is to describe the way in which the debates on incest and child sexual abuse are reduced to an empirical and behaviouralist construction of violent masculinity. Against this reduction, the chapter concludes with a preliminary excursus on the ethical relation of sexual difference. In the subsequent chapter, the ethical question is taken up in terms of the dominance of practical reason. In this essay, chapter 3, the concern is with the stylisation of obscenity as a legal and social problem. It provides a detailed reading of a legal decision which is "foundational" for modern obscenity regulation. The reading moves from a description of the implication of law in a governmental rationality to a description of the way in which legal reason comes to desire. The argument is that the desire of law can be read in the images that are necessary to legal judgement. It is this question of legal desire which is taken up and pursued in the final essay, Chapter 4. Once again, however, the problematisation shifts. Chapter 4 is concerned with the legal fantasy of the homosexual. The chapter begins and ends by reading case reports. In between, there is a detour which describes a strategy of homosexual law reform in terms of a history which is at once summoned and abandoned by the Sexual Offences Act 1967. The first case reading weaves together a legal judgement on the ethics of sado-masochism with a philosophical reading of the various ethical attentions of law on the threshold of modernity. The detour through history is

designed to raise a problem in and for both the socio-legal regulation of homosexuality and the proponents of its reform. The technique of the detour is to retrace the discontinuous emergence of the legal category of "homosexual acts". The final case readings describe the effect of the 1967 Act. That effect is to displace the asymmetry between the homosexual and the sodomite onto an asymmetrical relation between the homosexual and the gay. The argument is that the legal reason of homosexuality is both a practice of simulation and a practice of administration. In in this enterprise of administrative simulation, the homosexual emerges as a displaced figure of socio-legal desire. Chapter 4 thus draws together the main arguments that are pursued throughout the thesis. With differing emphases to be sure, each chapter suggests that the contemporary law of reason is socio-legal. As the term implies, it is a doubled enterprise - the rationality of law deploys a policing of the image and an image of policing. And it is in these terms that contemporary sexual politics has been prosecuted.

The thesis is the product of my own composition; it is, as the saying goes, my own work.

ACKNOWLEDGEMENTS

This thesis was pursued and completed in a situation of collegiality and scholarship unparalleled in the legal academy. For that, I am grateful.

My supervisors Beverley Brown and Peter Young provided intellectual support, stimulation and dialogue for the first three years in which the project was germinating. And they did so despite my exasperating blindness to the protocols of producing a thesis.

I would also like to thank the University of Edinburgh for awarding me a Senate Scholarship which was held between 1985 and 1988.

More recently, my friends in the Law Department at Lancaster University encouraged me, in the most elliptical and gentle ways, to complete the thesis. Les Moran, Alison Young, Michael Salter and Piyel Haldar are the remnants of that collegiality. Ronnie Warrington, Peter Goodrich, Costas Douzinas are missed. Maxine Robinson and Sharon Halliwell provided assistance with computer-technology when the hypertext got too much for me.

Les Moran provided the occasion for innumerable discussions of the issues in and outwith the thesis and commented on an early version of chapter 4. Alison Young read every line of the thesis and commented upon it in such a way that she has been inscribed indelibly throughout the text. Further afield, Phil Manning read an early draft of some of the ideas that have percolated into the thesis. Gerry Johnstone, my

colleague while at Edinburgh, has acted as a formidable interlocutor over the past seven years

My parents, Peter and Margaret Rush, have as always provided continuing financial support. But more than this, their love and affection was given without asking for anything in return.

My love and thanks to Alison.

It is man's hour,
the hour of masculine crime,
of deadly calculation.

H. Cixous, *The Newly-Born Woman*

Chapter One
NARRATION AND EMASCULATION:
the ligatures of law

Prior to any determination of the epoch in which it is said that you or I live - postmodern or medieval, modern or ultramodern - a question beckons. There are many. For me, here and now, it is the question of sexual difference. What is written in these pages is a response to its obligation - a response which attempts to *think through* the asymmetrical law of masculinity and sexual difference in contemporary politics. Its fate has yet to be specified. As a thesis, it proceeds by way of three case studies; namely, the debates on incest and child sexual abuse, the stylisation of obscenity as a legal and social problem, and the legal reason of "homosexual acts". While the research began with the problem of masculinity and sexual identity, in writing it has become necessary to redirect that problem and to implicate it in the question of sexual difference. Like Kant's orator, the thesis gives something which it does not and cannot promise - sexual difference as a *question*.

Illegitimate Silence, Legacy of Guilt

"The narrational voice is the voice of a subject recounting something, remembering an event or an historical sequence, knowing who he is, where he is, and what he is talking about. It responds to some 'police', a force of law or order ('What "exactly" are you talking about?'): the truth of equivalence. In this sense, all organized narration is a 'matter of the police', even before its genre (mystery, novel, cop story) has been determined."¹

By way of an introduction to the contexts in and to which the arguments of the thesis are addressed, it is necessary to begin with what has been

¹ J. Derrida (1981) "The Law of Genre", in W. J. T. Mitchell (ed) On Narrative pp. 51-79. Cf. M. Foucault (1974) The Archaeology of Knowledge p. 17: "I am no doubt not the only one who writes in order to have no face. Do not ask who I am and do not ask me to remain the same: leave it to our bureaucrats and our police to see that our papers are in order. At least spare us their morality when we write".

said and *done*. Although familiar, it is by no means self-evident. It is a story of masculinity and sexual politics, and it is a story which is at once ideal and material, programmatic and institutional. This section thus moves from a description of the emergence of a men's movement in Britain and the United States, to its codification in the narrative of men's studies, and concludes with the story of masculine identity and its law of anti-sexism.

Men's groups have existed in Britain since 1971. By the middle of the decade, they had both the size and the coherence to be described as a distinctive movement in progressive politics. It was also their self-description - although some caveats were entered on whether or not they should call themselves a "movement". Thus, the editorial to the first issue of the magazine Achilles Heel spells out the differences amongst the members of the editorial collective as related to "how we see men responding politically to the women's and gay movements, in particular whether there is a political basis for the growth of an autonomous movement, whether or not such a movement does in fact exist, whether it makes any sense for men to organise separately on the basis of being men."² Such caveats on the autonomy of masculinity and the movement

² Editorial 1978, Achilles Heel, no. 1, p. 3. In a dissenting view to the editorial, Metcalf picks up on the theme: "I remain troubled by one of the underlying themes in the editorial - that is, in this sexist society the development of the socialist movement will be strengthened by the formation and growth of an autonomous men's movement, made up of men organised on the basis of their gender" (Achilles Heel no. 1, p. 8). In a later issue, Seidler states that he is "suspicious of the confidence with which some political men have argued that although it may be all very well for men to get together in consciousness-raising situations, anything calling itself a 'movement' is clearly rejected." See V. Seidler (1979) "Men and Feminism", Achilles Heel no. 2, pp. 32-6 at p.32. Recently a collection of essays and drawings from the Achilles Heel magazine have been published in book format. Although I will continue to cite the actual magazine reference, the books are: V. Seidler (ed) (1991) The Achilles Heel Reader: men, sexual politics and socialism;

aside, it was reported by one participant that in the early 1970s there were some forty men's groups set up by and for men in Britain. Another participant suggested that by 1975 there existed between twenty and thirty such groups.³ In imitation of the women's movement, most were consciousness-raising groups. By the latter half of the 1970s, annual conferences were being held in London, Manchester and Bristol. One estimate of attendance at the Bristol conference of 1980 put the numbers at 300 men and approximately 30 children.⁴ In addition, men's centres had been established in many of the larger metropolises. In East London, a men's centre "is intended to be both a resource for existing men's groups in London, and a public place for men not already in groups to meet and contact one another."⁵ When the East London men's centre folded, a collective calling itself "Creches Against Sexism" established itself and listed among its activities such tasks as arranging creches for feminists, holding public meetings on "how men can act against sexism", fund-raising for feminist campaigns and activities, and collective meetings involving consciousness-raising for men. It was not only the issue of men's relation to feminism that was constantly on the agenda, but also the issue of men's relation to children. Week long

idem (ed) (1992) Men, Sex and Relationships: writings from Achilles Heel.

³ Respectively, A. Tolson (1977) The Limits of Masculinity, p. 143; and J. Hearn (1987) The Gender of Oppression, p. 171.

⁴ See Achilles Heel, 1980, no. 3 p. 35. For a personal account of the 1979 Manchester conference, see P. Morrison (1980) "Me At The Manchester Men's Conference 6-8 April 1979", Achilles Heel no. 3 pp. 17-9.

⁵ The statement of objectives for the centre is printed in Achilles Heel no. 2, 1979, p. 7. See also the statement of purpose for the Brighton Anti-Patriarchal Men's Centre in Achilles Heel no. 4, 1980, p. 7: "for men struggling against patriarchy and sexism - in themselves, in other men, in society, and a place to be with other men."

retreats were organised for "men and children" at Laurieston Hall in south west Scotland; individual men assisted in feminist childcare programmes.⁶

The main discursive activity of the men's movement was thus located in small consciousness-raising groups, childcare groups, men's centres and sometimes nationally at conferences. But also newsletters were produced by men's groups and circulated amongst various organisations.⁷ In 1978, a men's collective began a "magazine of men's politics" called Achilles Heel. Its first editorial stated its objective as "first and foremost we want to make public some of the issues we have been dealing with in our men's groups". Without claiming that the magazine would be the mouthpiece of the movement in Britain, the need for publicity was due to the fact that "the men's movement in this country has been hidden, largely silent about itself ... we have been isolated, both locally and nationally."⁸ By 1982, the magazine was selling between three and four thousand copies per issue, and the estimated readership was "probably nearer 15,000".⁹ In sum, a disparate collection of activities assembled together in men's groups and linked

6 On men and kids week, see T. Weld (1979) "Men's Week and Laurieston Hall", Achilles Heel no. 2 pp. 30-1. On feminist childcare programmes, see Out of the Pumpkin Shell, by the Birmingham women's liberation group (1975). See also "Including Fathers: men talk about Playgroup", in Contact Magazine, March 1976.

7 For example: Men's News was a newsheet that circulated amongst London groups; the Anti-Sexist Men's Newsletter was also a rotating production; see also Brothers Against Sexism, which went through several name changes, and more recently Men For Change.

8 Achilles Heel no. 1, 1978, p. 7.

9 For these figures, see "Achilles Heel - what next?", in Achilles Heel no. 6, 1982, p. 3. This was also the last issue until 1990 when it reemerged in Sheffield - albeit somewhat briefly.

together through an information network provided an *ad hoc* institution of men. In hearing itself speak, it instituted and posited the autonomy and coherence of masculinity *qua* masculinity - either in terms of masculinity as such, or in terms of the relation between the men's movement and the women's and gay movements. As an institutional discourse, the men's movement in Britain represented its *telos* as the liberation of the personal experiences of men from the disjunctions and contradictions of the masculine myth. In organising together, men would come not only to know their sexual identity but also to narrate their identity. Recounting one's masculinity is the best way of knowing our masculinity.

Such a movement of and for the assertion of masculine sexual identity was not however peculiar to Britain. At the same time as their emergence in Britain, men's groups were forming in Australia, in Europe more generally, and in the United States of America. Links were of course made with most of these other national movements, but it was the United States movement which was most influential in Britain.¹⁰

¹⁰ This influence was in terms of the structure of the arguments promulgated in the men's movement in England. More immediately, one example of influence was the work of Michael Singer at the Berkeley Men's Centre. A public talk given by him at the centre was taped, and replayed at the East London Men's Centre. A transcript of both the talk and an edited version of the subsequent discussion in London was reprinted in *Achilles Heel*, 1978, no. 1 as, respectively, "Male Sexuality and Sexism" (pp. 24-30) and "I MEAN YOU CAN HAVE A MALE CHAUVINIST FANTASY..." (pp.30-2). This was taken up in M. Gould (1979) "Why must I be a 30-year-old teenager in love?", *Achilles Heel* no. 2 pp. 8-10. More generally, books that came out of the men's group movement were read and discussed - most notably *Unbecoming Men*, in which a New York men's group put into print some of the issues they had encountered in their discussions.

In the United States, the press reported that there were some three hundred men's groups spread across America.¹¹ On the other hand, Farrell, one of the initial publicists of the North American movement, claimed that by 1974 he had personally organised some one hundred men's consciousness-raising groups. The National Organisation for Women (N.O.W.) had provided the prop for Farrell's activities. N.O.W. was the main organisational forum for North American liberal feminism.¹² In The Liberated Man, Farrell recounts his involvement in setting up a N.O.W. "task force" on the "masculine mystique" - a not unintentional reference to Friedan's "feminine mystique". Using local branches of N.O.W., Farrell travelled across the states of North America proselytizing and setting up men's consciousness-raising groups. His account of the 1974 National Conference suggests the evangelical fervour: "hundreds of facilitators were trained to return to their local communities to form a nationwide network of men's and joint consciousness-raising groups and to carry out national demonstrations and "actions"". ¹³

From its beginnings the coherence of both the British and the North American movements displayed internal differences. And by the second half of the 1970s, these differences had become fixed into factions. The factional map of the movements had a tripartite schema: "liberal" therapeutic groups, "reactionary" campaign groups for men's

¹¹ Quoted in J. Pleck and J. Sawyer (eds) (1974) Men and Masculinity, p. 152.

¹² For the N.O.W. charter, see R. Morgan (ed) Sisterhood is Powerful.

¹³ W. Farrell (1974) The Liberated Man, p. 141.

rights, and "radical" anti-sexist men's groups.¹⁴ The polemical context of Farrell's claim that he *personally* organised numerous groups is indicated by his lament over the radical strain that had informed the beginnings of the men's movement in the United States. Thus, he describes and advocates the expansion and consolidation of the men's movement around the theme of "personal growth". The characterisation was that therapeutic consciousness-raising in small groups composed of men (and sometimes both men and women) and led invariably by a facilitator with the credentials of psychology would provide a momentous advance in the realisation of man's full "human potential". An associated faction, but one which does not centre upon consciousness-raising, is an activism which evinces a concern for "men's rights". The activism involved campaigns around legal aspects of "discrimination against men". Operating under the banner of equality, men's rights were to be asserted against what was alleged to be the dissymmetry produced by the advocacy of women's rights. Thus, support was organised for men fighting custody cases, while lobbying for the recognition of father's rights in abortion becomes prevalent.¹⁵ At the same time as the men's movement tenses with the strains of both these factions, a number of

¹⁴ The schema was not of course hard and fast. Rediscovering Masculinity by V. Seidler (1989) writes of the Growth movement, primarily to distinguish it from the Red Therapy group in which he was involved and which combined anti-sexist consciousness-raising with a specifically Reichian therapy. Similarly, Refusing to Be A Man by J. Stoltenberg (1990) draws on the tradition of "human potential" to make its arguments although it has been identified as belonging to the anti-sexist genre which is pro-radical feminist.

¹⁵ The name of one such lobbying group was Campaign for Justice in Divorce. In England, more recently Families Need Fathers has been operative. In contemporary family law, the textbook Children, Parents and the State by A. Bainham (1988) represents the position. The men's rights position is trenchantly denounced by the faction of anti-sexist men in pursuit of its profeminism.

men's groups, identifying themselves as radical, coalesce into a faction known as "men against sexism". In Britain, a number of the newsletters circulating around and apropos men's groups take the phrase as their title. A variation on the theme is the "Men's Anti-Sexist Newsletter", popularly known by its acronym M.A.N.. The magazine Achilles Heel in 1980 changes its subtitle from "a magazine of men's politics" to "an anti-sexist men's magazine".¹⁶ In this faction, the stated commitment is an opposition to all forms of sexism - that which exists in men, towards men, and against women. These various sexismisms are stated to be social and historical constructions and are denied as viable options for any current or future lifestyle. The anti-sexist perspective is also marked by a denunciation of any attempts to curtail the advances of the women's or gay movement - and particularly attempts from within the men's movement or from within socialist politics. It is this perspective which became dominant in Britain, and it is their practices which will have provided the prop on which an academic genre of men's studies is secured.

By the middle of the 1980s, almost all towns in Britain had at least one anti-sexist men's group, with some of the larger cities boasting three or four. Despite this, the cultural resonance of men's groups was on the wane. From the 1980s onwards, the national Men's Anti-Sexist Newsletter appeared intermittently. The last national conference of Men Against

¹⁶ In North America, a similar faction is to be evidenced in For Men Against Sexism: a book of readings edited by J. Snodgrass (1977). The essays in the book were recommended reading in Britain. In the same year in Britain, the anti-sexist perspective found its most developed and coherent statement in the monograph Limits of Masculinity by A. Tolson (1977), a one-time member of a Birmingham men's group. It was reissued in 1982 and 1985 - primarily in response to the emergent academic genre of "men's studies".

Sexism took place in 1980, and the last issue of Achilles Heel was produced in 1983. By the middle of the 1980s, the genre of men's studies becomes discernible as a discrete field in academic publishing and, in the 1990s, it is a flourishing industry. At the same time, with millennial enthusiasm there is a resurgence of a national network of men's groups. A first Men's Conference (the anti-sexist adjective has been lost) is held in 1989. At this conference, "the general emphasis on creativity and the joyous celebration of our shared masculinity showed the men's movement coming of age as far as its internal network of groups is concerned. The question now is to spread the movement's influence amongst the multitudes of men untouched by the kinds of self-awareness we now take-for-granted in ourselves".¹⁷ After several attempts to restart Achilles Heel, a collective in London and Sheffield took over the magazine, re-released its six back issues, and has produced one more issue. As a complement, a Warwickshire newsletter Men For Change is designed to keep "men in touch with individuals, groups, conferences and events around the country and abroad, and with political issues".¹⁸

This then is the situation of men's groups. They provide the material site in which the programmatic assertion of masculinity is adumbrated. But it is not the only site. As already mentioned, just as the men's groups begin to subside into the obscurity of a discontinuous and idiosyncratic practice, the genre of men's studies begins to obtain some purchase in the academic arena. It is the academy that provides the

¹⁷ Men For Change newsletter no. 12. A second conference followed in June 1990.

¹⁸ M. Luck, editorial, Men For Change no. 13, p.1.

primary material site for the current programmatic assertion of masculinity. In fact, several of the proponents of men's studies - or at least, the authors of exemplary texts in this genre - were intimately involved in the initial promotion of men's groups: Tolson, Seidler, and Hearn, being the most notable in England.

The genre of men's studies is not so much a departure from the discourse of men's groups as its reiteration in a different institutional field. The reiteration is however not without its differences. In general terms, the discourse of men's groups is reframed and thus reconstituted by the protocols of reading and writing in the academic institution. What was necessary is a *formal codification*. The law of men's studies is that it demands a narrative of masculinity. The discourse of men's groups had to be recast in narrative form. But more than this, it was not only the discourse but also its subject matter that had to be narrativised. Masculinity had to be constituted as a narrative which, as narrative, displayed the myths and stereotypes of masculinity as expressing a logic - either formal or substantive, objective or subjective, ideal or real. In either case, and most often as both, masculine sexual identity functions as an expressive system.

As a preliminary to setting out the terms of the narrative, several moves in the narrativisation of masculinity can be delineated. These moves constitute the preconditions for the reiteration of the discourse of men's groups as the (primarily sociological) genre of men's studies. These preconditions do not have the status of themes - many of which are repeated from men's groups to men's studies - but rather they are framing devices. A first manoeuvre is that masculinity had to be

formulated as coursing through the everyday - from the habitual and unnoticed billboards to the pronouns one uses as we speak. It is concerned with the minutiae of experience; the details of life had to be worked retail. But lest these details flood out the story - a possibility which the discourse of men's groups accepted - at the same time masculinity had to be totalised. It is as a totality that masculine sexual identity is to be emplotted and exhaustively mapped. Second, a central place had to be granted to the obscurity of masculinity. It is self-evident, obvious, taken-for-granted. But more than this, masculinity is not only hidden but also hidden from itself. It is not only that masculine sexual identity is unknown - a fact which would constitute men's studies as a simple mimesis of women's studies. Rather, that masculine sexual identity remains unknown to men. And as such, its obscurity is constituted as a denial of self but a denial with positive force - it constructs, imposes, constrains, dominates.

A third procedure is that the discursive construction of masculinity and male sexual identity had to be used not as a test but as a representation which waited to be interpreted. The confession of masculinity in men's groups operated as a test, a testimony that attested one's identity as a man but also that one survived the rigours of masculinity. In short, the confession was a performative speech act, a pure signifier. In the genre of men's studies, that is no longer sufficient - and sometimes not even necessary. The performance of masculinity had to be reduced - more or less - to its constative dimensions. Whereas the "articles" of the men's movement are riddled with the strategies of cut and paste, with an anxiety about the very possibility of saying masculinity, now it becomes necessary to emphasise the third

person narration - or else an impersonal narration. It becomes necessary to extract what is said in the saying of masculinity, the represented from the representing. In pedagogic terms, the interpretations of masculinity must be defined and classified in order to be understood. Having arranged the interpretations into a schemata, they can be taught and published. Moreover, they can be criticised. The reduction of the performative dimension of men's group discourse displaces the performance of masculinity onto the interpretive level where it is produced as a performance of criticism. Thus, the possibility of a metacritique - a critique of critical interpretations of masculinity. The crisis of masculinity is a crisis of interpretation. Masculinity returns at this level as that which speaks for itself - thus necessitating further interpretation. Paradoxically, masculinity becomes a necessary trope in an interminable spiral of interpretation.

If these are the manoeuvres that translate the discourse of men's groups into the narrative of men's studies, it remains to set out the terms of the narrative thus produced: the narrativisation of masculine sexual identity as the crisis of masculinity The agon begins:

The women's movement has put gender and sexuality on the agenda of a radical politics. Women have interrogated the social construction of femininity and female sexuality - the subtle, petty and numerous ways in which the acts and personalities of individuals are judged according to their gender. In doing so, they have obviously described and criticised the situation of men. Nevertheless, the critical description of men has been a subsidiary aim of the women's movement. The situation of men has only come to light as feminism was

recovering women's experience from beneath the mantle of patriarchy. As such, the experience of masculinity and male sexuality, the experience of male sexual identity, has rarely if ever been examined in and of itself. Rather, it has been primarily directed towards an analysis of women's oppression. While the feminist critique of patriarchy has placed male sexual identity in crisis, it has at the same time left little room for men to reformulate their own identity and thus to contribute to a reconstruction of sexual politics. Patriarchy has been set up as monolithic - as if, by virtue of their masculinity, men are guilty in advance. Prior to any act, any thought, any utterance, individual men are doomed to reiterate the patriarchal imperative. Such is the feminist indictment. It addresses both the problem of women and the problem of men. In articulating these two problems, however, feminism has granted a priority to the problem of women's oppression. Men have either been left to their own devices - to go on oblivious to the advances of feminism - or they have been foreclosed from responding to the advances of feminism and interrogating male sexual identity itself.

But this failed romance of feminism and men should not be taken as a criticism of the women's movement. What is necessary is to disarticulate the problems of men and women. For women, it is understandable that women's oppression be the primary question since it is the experiences of women that feminism is trying to reclaim for women. But for men, the primary problem must be the experience of masculinity. What is necessary is to articulate the problem of men *for men*. And this must not ignore, must take into account the advances of feminism.

The articulation of male sexual identity must be sympathetic to the aims of feminism vis-a-vis women, and to the implication of men in the continued oppression of women. But that is not the whole story. What feminism has revealed for men is that male sexual identity itself has rarely been interrogated *by men*. Men have been loathe to question what masculinity and male sexuality mean for them. And nothing short of a miracle has changed this: "The valuation of human actions according to the gender of the one who acts is a notion so unremarkable, so unremittingly commonplace, and so self-evident to so many that its having come under any scrutiny whatsoever is a major miracle in the history of human consciousness".¹⁹ Thanks to the women's movement, it is no longer possible to remain in silence, hidden from ourselves, blind to the valued construction of male sexual identity and its effects on women *and* men. It is time to speak of masculinity: "This is a book about male sexuality - about what it means to a man to know another person intimately. It is about the feelings, the absences and the fears that men bring to their sexual relationships. It would be nice to have put a more joyful phrase in that list, but these days sex is a fraught affair for many men. It is a topic we break away from or parry with a joke. There is a silence about it; in all the voluminous literature on sex and sexuality, there is very little on male sexuality as such. Most of the men contributing to the book have discovered that it is also a hidden subject, resistant to their first investigations. It seems as if it's so much an accepted part of everyday life that it is invisible."²⁰

¹⁹ J. Stoltenberg (1990) Refusing To Be A Man, p. 20.

²⁰ A. Metcalf and M. Humphries (eds) (1985) The Sexuality of Men, p.1. The quote forms the first paragraph of the introduction to the book and is written by A. Metcalf. Cf. from a post-structuralist tradition, the demand which inaugurates What A Man's Gotta Do by A. Easthope (1986): "It is time to speak about masculinity, about what it is and how

Masculine sexual identity is an absence in the orders of speech and vision. But it is also present. Images of masculinity and male sexuality speak to us from advertising billboards, from the columns of the daily press, from the channels of television and the screens of film and video. Our culture is saturated with stereotypes of masculinity - and these myths are not only addressed to women but they also say something about men. As individuals, every day we see, hear and speak the images of masculinity. They inform our everyday lives.

What the pervasive presence of the myths bespeak is the fact that masculinity is a social, cultural and, above all, political construction. They are constructions promoted by our parents, our history, our peer groups, our teachers, our society. The problem is not so much that these myths exist but that we take them for granted; we treat them *as if* they represent the reality of masculinity and *as if* their promotion is the most normal thing in the world. In doing so, we have become someone other than ourselves; we live under the tutelage of the other. In obeying the culture of masculinity, we sacrifice ourselves as men: "no sacrifice no matter how demeaning can be too great".²¹ The myths are mere metaphors, substitutes for the reality of masculinity. Men might try to live up to what is expected of them - to be assertive, a tower of strength, a breadwinner, authoritative - and in doing so, we live a lie. Of course, to live a lie has its benefits. Our authority remains unchallenged, we get

it works. This collection looks at the images of masculinity put forward by the media today and analyses the myth of masculinity expressed through them."

21 J. Stoltenberg (1990) op.cit. p. 20.

paid more than women, we get the better jobs, we participate in political life, and so on. But it also has its costs - the exclusion of men from the personal, the fear of emotions and intimacy, we are cut off from our children, we lose touch with ourselves and others. We have our masculinity in common but it is a divided unity - we are divided against ourselves. Moreover, it does not just have disastrous consequences for ourselves both individually and collectively as men. It also has its price for others - women are raped, harassed and abused; women are seen and treated as objects by men; children are abused by their fathers. In choosing to live out the lie of masculinity, what has remained unseen and unspoken is that it is a lie and that men can be caring, emotional, helpful, affectionate. If not in the past, if not now, then soon. We have become what we are and so we can change. With the will to change, we can free ourselves from the self-incurred tutelage to the myths of masculinity and its devastating consequences - both for ourselves as men, and for human society. What is necessary is to politicise (which is to say, publicise) that which has been consigned to the personal - male sexual identity.

Yet of course, our tutelage to the other is not only self-incurred. We have not only chosen to live up to and live out the myths of masculinity. It is also the fact that the myths and injunctions of the billboards and the teachers, peer groups and society, are *imposed* upon us. Myth and reality are not simply disjunct but also identical. The culture of society *is* masculine; the reality of society *is* the reality of men. And that is not to forget that male sexual identity is socially constructed. It is however to say that the representational reality of masculinity is fashioned according to a political logic which is systematically imposed

with more or less success. The distinction between the sexes is itself an exercise in political reason. It is this categorical reason which evaluates and judges the lives of men, as much as women. It is not that masculinity has been excluded from the personal; rather, the personal is always-already political. In other words, it is not so much the stereotypical traits attributed to masculinity and femininity. Rather, the problem is the structure of attribution itself. The grammar of political reason is masculine-identified. And it is by virtue of this claustrophobic structure that men have become what they are. Men have become the mouthpieces of the sexist socio-political system. If we are not its unwitting mouthpieces, then our attitude is an unrelenting cynicism. In any case, whether we choose to model ourselves on the sexist myths or whether we are mouthpieces of a sexist logic, whether we become the subject of the myths or whether we are subjected to the system, neither position is tenable *now* - or at least, it is more difficult now.

The current condition of masculinity is critical. As the tale tells it, masculinity is in crisis: "all is not as it should be for the male sex".²² There are of course numerous origins, various reasons for the devaluation in the cultural capital of masculinity. In fact, the proliferation and pervasiveness is one consequence of such a devaluation in the value of men. But the crisis itself can be traced to the threshold of modernity. On that threshold, the Kantian critical enterprise instituted a reason which had as its *sine qua non* the exclusion of emotion. And if desire was excluded from the domain of reason, then that exclusion was gendered: masculinity was identified with reason and thus distinguished

²² A. Metcalf and M. Humphries (eds) (1985) op.cit. p. 1.

from the femininity of desire and emotion.²³ Although Kant provides the origin of the institution of reason as masculine, the *increase* of myths perpetuating that institution can be traced to more recent social, cultural and economic changes. In this respect, the Second World War was a turning point. If the war supported the myth of masculinity as a violent reason, its aftermath undercut that myth. Soldiers returning home were confronted by different expectations of what it is to be a man, and it is this which contributes to their difficulty in living in peacetime. There was also the rising unemployment which meant that the myth of the man as breadwinner becomes more difficult to take for granted as a fact of everyday life, as the pre-ordained role of men. And not the least factor contributing to this developing status-frustration, are the cultural changes of the sexual revolution - more specifically, the emergence of the women's liberation movement in the late sixties and seventies. "When the ideas of feminism first reached me about fifteen years ago, almost every detail of my life began to change, in ways I still don't full comprehend".²⁴ But it wasn't just the ideas of the women's movement - "some mind-blowing feminist books"²⁵ - it was also their practices. As women changed, the pressure for men to change became even more intense. And this filtered through into our daily lives - in hours of intense personal discussions with close women friends. And similarly with the gay liberation movement. Its emergence confronted men with their

²³ The work of V. Seidler has been most persistent in tracing the crisis to this particular reading of the Kantian turn. See V. Seidler (1986) Kant, Respect and Injustice: The Limits of Liberal Moral Theory. For its reiteration in the more explicit context of men's studies, see *idem* (1989) op.cit., esp. ch. 2; and *idem* (1987) "Reason, desire and male sexuality" in P. Caplan (ed) The Cultural Construction of Sexuality.

²⁴ J. Stoltenberg (1990) op.cit. p. 11.

²⁵ ibid p.11.

stereotypical presumption that masculinity is heterosexual.²⁶ In any case, the emergence of both the women's and the gay liberation movement prompted a crisis in heterosexual masculinity. Men had become anxious, set adrift. Even those who were trying to change were liable to the charge that they were simply reasserting their power in new circumstances, or they were confronted by the riposte that they simply had not "come out".

If the criticisms of men were that they were simply reacting without really changing, then this is also the anti-sexist criticism of the proliferation of stereotypes. The images were on the increase and they were becoming "harder, more violent and assertive".²⁷ The increase in images was an attempt to shore up the crisis in masculine sexual identity which had been produced by the recent cultural and social changes.

The form of this crisis is legal. The crisis of masculinity is a crisis in the *legitimation* of masculinity. For some, the gap between myth and reality has become such an abyss that it was no longer possible to go on believing in the myths. Thus, we changed. In some cases, for the worse. The idea of sexual identity, in fact, has a claim on us that our

²⁶ This was also turned against the anti-sexist story of a crisis in masculinity. T. Carrigan, R. Connell and J. Lee (1987) "Towards a New Sociology of Masculinity", in H. Brod (ed) The Making of Masculinities constructs an immanent critique of the emergence of men's groups in this way: arguing that the men's movement had not taken on board the insights of the gay movement and as such was itself heterosexist. See, for a more polemical excavation of the heterosexist stereotypes of men's group stories, M. Gould (1978) "Why must I be a 30 year old teenager in love?", Achilles Heel no. 2, pp. 8-10.

²⁷ A. Metcalf and M. Humphries (eds) (1985) op.cit. p.1.

actual experience does not; "for if our experience 'contradicts' it, we will bend our experience so that it will make sense in terms of the idea."²⁸ And thus, we either conformed to and insisted on the old imperatives in ever more violent ways, or we took on board the new demands. For others however, there was not just a historical disjunction between representations and reality. Rather, the representations of masculine sexual identity were numerous and plural, each with their own competing and conflicting interests. The grammar and logic of masculinity is incoherent and ambiguous. The logic is still imposed but in a contradictory fashion. We found ourselves being pushed every which way *but loose*; still the mouthpieces of the logic but the messages we heard ourselves transmit argued for different experiences. In such a critical condition of self-representation, the crisis of masculinity has to be dispelled by men. Only men could cleanse their hands of the guilt of masculinity. It is necessary for us to speak out; we must describe the myths and denounce their sexism. It is necessary for us to tell the whole story of masculinity and male sexual identity. The crisis is intolerable. Men must change. It might be done in slow motion, but we are unbecoming men. We are learning a radical new ethic of sexual justice: "determining to learn as much as one can know about the values one has done and the acts one chooses to do and their full consequences for other people - as *if* everyone else is absolutely as real as oneself."²⁹

²⁸ J. Stoltenberg (1990) op.cit. p. 17.

²⁹ ibid p. 14 (italics added).

Such at least is one way - albeit parodic - of setting out the narrative of masculinity inscribed as the genre of men's studies. The crisis and criticism of masculinity installs a demand that men not only come to know but also to tell the myths and realities of masculinity. These myths, these realities must be recounted as *if* they told a story. It is only on the condition that we create our reality in the form of a story that we can treat everybody else as real as ourselves. Men are called to order by representing themselves to themselves in the style of a narrative. It is as such that the particularities of the masculine subject is charged with ethical significance: to narrate masculinity is to call men to account. Moreover, that ethical significance is legal. As Hayden White has remarked, "we cannot but be struck by the frequency with which narrativity, whether of the fictional or factual sort, presupposes the existence of a legal system *against or on behalf of which* the typical agents of a narrative account militate ... This raises the suspicion that narrative in general ... has to do with the topics of law, legality, legitimacy, or, more generally, *authority*."³⁰

The system of law which is posited in the genre of men's studies is not just the legal institution narrowly defined but more generally a social site of language. That site is named as the law of sexism. And, as Hayden White indicates, the fact that sexism is posited in the mode of denunciation does not mean that the discourse of men's groups is beyond narrativisation. In fact, the mode of denunciation displaces the

³⁰ Hayden White (1980) "The Value of Narrativity in the Representation of Reality", *Critical Inquiry* vol. 7, no. 1 pp. 5-27 at p.17 (first italics added). An exemplum: V. Seidler (1989) *op.cit.* p. 193: "So we can think critically for example about legal institutions and the way they work with social security to define and enforce conceptions of 'right behaviour'".

law of narrative from the content to the form of the discourse. It posits sexism as the law of masculine sexual identity and, in the very act of denouncing sexism, shifts the burden of law onto its argumentative and conceptual strata. Denouncing the law of sexism, men's studies legislates anti-sexism.

As a formal law, as legislation, the law of anti-sexism veers between an unbounded subjectivism and a claustrophobic structuralism. And it is this veering, this oscillation itself which constitutes the antinomy of law. As Rose diagnoses the after-effect of the Kantian critical enterprise, ""ends/means; persons/things; absolute/relative. These distinctions are themselves fundamental juridical distinctions; they are the distinctions on which Roman private law is based: ergo, the form of freedom is the form of private law".³¹ Each term of each of the distinctions is implicated in its other. And it is this implication which produces the oscillation. The effect is that the genre of men's studies will have explored the form of masculinity (its reason, its myths, its stereotypes), the substance of masculinity (its values, its meanings, its experiences, its practices), but most often it institutes the distinctions and dreams of their reconciliation as the realisation of "human potential" or, no less immodestly, the potential realisation of masculine sexual identity as autonomous, self-enclosed.

The refusal of sexism grants a meaning to the new masculinity. But in the discourse on men and sexual politics, this refusal is not the

³¹ G. Rose (1984) *Dialectic of Nihilism*, p. 20. The whole of this introduction provides an excellent *diagnosis* of the jurisprudence of criticism.

only refusal on offer. Paralleling the genre of men's studies, there has also been another genre of criticism that bespeaks the masculine - but this time within a problematic of *sexual difference*. What is decisive for this genre is a linguistic and rhetorical turn in the study of masculinity and sexual politics.³²

Legitimate Language, Legacy of Impossibility

"I always speak the truth. Not the whole truth, because there's no way to say it all. Saying the whole truth is materially impossible: words fail. Yet it's through this very impossibility that the truth holds onto the real."³³

By way of preliminary comment, it can be noted that the turn to language does not explicitly turn away from the genre of men's studies. In fact, it is rare to read an acknowledgement of the existence of men's studies.³⁴

³² The texts that institute and partake of this turn to language are numerous. The canonical text is A. Jardine and P. Smith (eds) (1987) Men and Feminism and, more recently, J. Boone and M. Cadden (eds) Engendering Men: The Question of Male Feminist Criticism. There are numerous others. See particularly, K. Silverman (1992) Male Subjectivity At The Margins; P. Smith (1988) "Vas", Camera Obscura vol. 17 pp. 89-111; J. Allen (1990) "'The Wild Ones': the disavowal of men in criminology", in R. Graycar (ed) Dissenting Opinions; A. Kroker and M. Kroker (eds) (1991) The Hysterical Male; L. Bersani (1988) "Is The Rectum A Grave?" in D. Crimp (ed) AIDS: Cultural Analysis, Cultural Activism; S. Watney (1981) "The Banality of Gender", Oxford Literary Review, vol. 8 nos 1-2; J. Flower MacCannell (1991) The Regime of the Brother; D. Pease (1988) "Patriarchy, Lentricchia and Male Feminisation", Critical Inquiry vol. 14; P. Schwenger (1989) "The Masculine Mode", in E. Showalter (ed) Speaking of Gender; T. Modleski (1991) Feminism Without Women. See also the special issues of Camera Obscura no. 17; Differences vol. 4 no.1.

³³ J. Lacan (1987) "Television", October no. 40 (spring) p. 7.

³⁴ Similarly, men's studies has judged itself too wise to read the turn to language. Which is not to say that it does not mention the linguistic and rhetorical turn and sometimes to claim the name of deconstruction for itself. In this respect, Seidler has been the most staunch and virulent in his rejection of (post)structuralism and a consequent reiteration of the genre of men's studies. See particularly, V. Seidler (1989) op.cit. esp. chs 1, 7, 10. The first salvo is fired in his 1979 essay "Men and Fenminism" in Achilles Heel, no. 2 pp. 32-6 which makes much the same arguments against structuralism as the later book does against poststructuralism.

Nevertheless, the turn does constitute a veritable diagnostic of the anti-sexist narrative. Rather than the narrativisation of masculinity, what is here posited is the masculinity of narrative. And the critical move is to emasculate narration. Masculinity does not speak for itself. Rather, it speaks: and the question is how does *it* speak? By what tricks and turns of language?

Such a shift in the question does not constitute an evacuation of politics. Rather, it puts politics in question - and it does so by emphasising and radicalising the implicit and not-so-implicit structuralism of men's studies. It is anti-sexist but it redirects the law of sexism towards the preconditioning of experience, towards the discursive construction of experience. Sexual difference is thus constructed by the ordering of narrative - its desire for the centre, for closure, for plenitude, for meaning, for autonomy. The morphology of this desire is phallic. Anti-sexism is thus repositioned as a refusal of narrative representation, a refusal of meaning as masculine. What is denied in the anti-narrative genre is the phallocentrism of meaning-production, of social production, of the construction of subjectivities. Rather than the legacy of silence and its legitimisation of sexist subjectivities, it is the categorical law of narrativisation which is posited as the process whereby sexual difference is excluded from politics.

If the shift from representation to anti-representation provides one difference from men's studies, another difference should be noted. The linguistic and rhetorical turn in the study of masculinity takes place and is most often associated with the discipline of film and literary criticism -

or, more generally, cultural studies. Like men's studies, it is an enterprise which reads the myths of masculinity. Unlike men's studies, it is not a multidisciplinary enterprise. It does not bring to bear a variety of disciplines - preeminently, sociology, psychology and history - to explain a singular yet divided masculinity. Nor does its coherence derive from its subject of study - the culture of masculinity. Rather, although privileging certain disciplines (most notably, semiotics and psychoanalysis), the rhetorical and linguistic turn in the study of masculinity is interdisciplinary. Disciplines are posited as differential and differentiated spaces, in much the same way that the culture of masculinity is posited as heterogeneous to itself rather than divided against itself. Moreover such heterogeneity is constitutive of the masculine subject. It is reiterated from discourse to discourse, from law to sociology to medicine to criminology, and as such it is possible to speak of a complex of masculinity. But in each instance of its use it is different. The difference within the reiteration of masculine sexual identity is that which disrupts any possibility of totalising the discontinuous construction - either synchronic or diachronic - of the masculine subject. In short, the interdisciplinary construction of masculinity produces an intersubjective masculinity, whereas the multidisciplinary construction of masculinity produces the divided unity of masculine sexual identity

Numerous other differences from men's studies can be elaborated. That said, the differences from men's studies are represented in the anti-representational genre as a turn away from structuralism. Structuralism is an attempt to develop a general theory of language. Post-structuralism however is an enterprise which spells out

and radicalises the implications of that general theory of language for the human sciences. As it focuses on masculinity and sexual difference, those human sciences are, as I have remarked, primarily film and literary criticism. For my purposes, the implications raise a double question: the question of the order of the image and, relatedly, the question of the subject of that order. The post-structuralist study of masculinity and sexual politics is linguistic because it pays particular attention to the relations between signifiers (the order of the image), and it is rhetorical because it focuses on the relation between signifiers and their effect (the order of the subject). In short, it describes the objective and subjective structures of reading and viewing such that the subject of masculinity is posited as a signifying *effect*.³⁵ Let us then follow the tricks and turns of this genre.

In men's studies, the ground of meaning and subjectivity is consciousness - a consciousness that is either transcendental to or immanent in our everyday practical activities. With the anti-representational turn, that ground is displaced onto language and analogous structures - filmic or literary texts, the psyche, or more generally, culture. In the now-infamous formula of Lacan, the unconscious is structured *like* a language. If the trace of the unconscious is in the operations of the dream, then the work of condensation and

³⁵ Cf. V. Seidler (1989) *ibid* p. 4: "But recent developments, particularly under the influence of structuralist and post-structuralist theory, has undermined potential critical insight by *making it impossible to think about the relationship between language and experience*" (italics added). Poststructuralism does not think the event of masculinity as disposable around two orders - the order of language and the order of experience. Having said that, it does nothing but think the relationship between language and experience - and that is the import of positing the masculinity of the subject as a signifying effect.

displacement is analogous to the linguistic operations of metaphor and metonymy. Similarly, if the filmic or literary text is analogous to a dream, then they also *work* in analogous ways. What is at stake in this displacement onto language is the *grounding* of consciousness. But, contrary to what is often assumed, consciousness is not done away with. It is put to one side, and what is put to one side is the use of consciousness as an ordering principle, its use as a presumption that governs the materiality of practices. Having been displaced, consciousness returns as an after-effect of language operations, or language-like operations.³⁶ Moreover, the unconscious does not provide a ground. Rather than disposing experience between the order of the conscious and the order of the unconscious, the two orders are so implicated in each other that the distinction is indeterminate. The ground of masculinity is neither revealed in conscious meaning nor is it hidden in an unconscious meaning. If it has a ground, it is linguistic - it is the relation between signifiers.

How then is semiosis formulated in structuralism? For Saussure, meaning is not an intrinsic property of signs. It is not self-evident, and thus without more cannot be turned into evidence of the self. Rather it is created in the parapraxes, the slips and gaps of language. Meaning is an effect of the differential values in and of language. Nevertheless, for

36 Cf. V. Seidler (1989) *ibid* p. 182: "There is no way that we can appeal to any space of experience outside of these discourses without being accused of being 'essentialist'". No doubt in the anti-essentialist enthusiasm of postmodern jargon, essentialism has been hurled as an accusation by many. To this extent, Seidler's demand is appropriately aggrieved. Essentialism is however not a matter of semantics but a question of the appeal to an outside, an *a priori*. To this extent, men's studies is essentialist. The question - of ethics and politics - is of course the *necessity* of essentialism in sexual politics.

structuralism, this differentiation is always accompanied by a procedure of combination. With the regularity of clockwork, the combinatorial dimension of language converts differences into binary oppositions: signifier and signified, law and society, masculinity and femininity, heterosexuality and homosexuality. It is this antinomic structure that constitutes the sign; the sign is the *unity* of signifier and signified. Or, in Hegelian terms, the identity of difference and identity. Moreover, the combination of signifier and signified is such that, in every instance of its use, the sign has the same referent.

What constitutes the post of post-structuralism is that structuralism is set up as privileging the side of meaning, of semiosis. A binary opposition is not simply a neutral combination; the coupling of signifier and signified is always-already masculinity *over* femininity. As Derrida has remarked, "in a classical philosophical opposition we are not dealing with the peaceful co-existence of a *vis-a-vis*, but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc., or has the upper hand)."³⁷ It is the hierarchy that is reiterated by structuralism when it constitutes the unity of the sign. The suspicion that is thus suggested by post-structuralism is that structuralism's privileging of semiosis constitutes meaning as masculine, and the feminine as meaningless. Thus, Cixous poses the question of sexual difference: "And all these pairs of oppositions are *couples*. Does that mean something? Is the fact that Logocentrism subjects thought - all concepts, codes and values - to a binary system,

37 J. Derrida (1981) Positions p. 41.

related to "the" couple man/woman?"³⁸ The combination of differences converts the process of difference into a binary opposition, a binarism in which the second term of the couple is always-already devalued. And it is this hierarchical devaluation that constitutes the unity of the sign, the system of sexism. Combination, systematisation, unification *takes place* at the expense of the relation between signifiers, at the expense of the plasticity of signifiers.

In a representational model, then, language is secondary to meaning; language is the carrier of meaning and consciousness is the ground of meaning. Structuralism reverses this hierarchy such that language creates meaning; meaning is posited as an effect of language, of signification. Such a reversal is necessary if justice is to be done to the fact that it is a hierarchy - only by overturning the hierarchy is it possible to trace the "interests" and commitments of the hierarchy, to describe its violence. But it is also a reversal which implicates structuralism in the hierarchy. The privilege accorded to meaning by structuralism implicates structuralism in a representational model of language. Myths are presumed to transmit a content, an idea, a meaning. Stereotypes are posited as the vehicle for the transmission of a message. It is as containers of meaning that the myths and stereotypes of masculinity can be tested (*testa*: earthen vessel, pot). As containers, the myths encode and carry a message - the message of sexism, patriarchy, humanism, masculinity. It is the kernel of sexism that *precedes and governs* the process of representation - sexism is the order of representation. More specifically, the representational model

³⁸ H. Cixous (1986) "Sorties", in H. Cixous and C. Clement, The Newly-Born Woman p. 64.

presupposes a subject who transmits the message - whether that be a particular person, or a class of interpreters, or an institution, or even more impersonally, a logic such as sexism. Not only does it presuppose a transmitter which more or less governs the myth, but it also presupposes a receiver of the myth - again a receiver which may be located in an individual reader or viewer but also in a class of men or a culture, or a society as a whole. As communication, the representational model posits - either in the past or in the future - an intersubjectivity, without interference, without static, without conflict. What has been or will be communicated is the whole truth and nothing but the truth. More or less.

Structuralism thus has two moments: it posits the differential constitution of language, and it posits a binary structuring of those differences. It is structuralism's emphasis on the latter at the expense of the former that marks its implication in the representational model. Post-structuralism reverses this privilege. It emphasises the differential value of language, the signifier as marked by difference. If meaning is differential and arbitrary, then it is this conventionalisation of meaning which post-structuralism draws on. It attempts to bring the differential process out from under its subjection to the rule and regularity of structuralism. In sexual political terms, the desire of structuralism for regularity is aligned with the masculine; while the process of difference is named and affirmed as feminine.³⁹ In linguistic terms, what is

³⁹ Jardine has designated this process of naming and affirming the feminine in post-structuralism as *gynesis*, and it may be counterposed to the *andresis* of men's studies - a putting-into-discourse of masculinity. See A. Jardine (1985) Gynesis: configurations of woman and modernity.

privileged in post-structuralism is the relation within and between signifiers, rather than the relation between signifiers and their effect.

Of course, in its own terms, it is possible to expect that the post-structuralism of anti-representation may still be implicated in the hierarchy which it reversed. Thus, it can be noted that it has become a familiar criticism of the anti-representational genre that the genre itself is phallogentric. For my purposes, this criticism does not reject the turn to language but it does note the displacements that occur as the genre diagnoses the phallogentrism of culture. The diagnosis posits masculinity not as the signified of myths and stereotypes but as a transcendental signifier. As a signifier, masculinity obtains its value in differentiation from other signifiers, but as a transcendental signifier, the run of signifiers grounds to a halt. The relation between signifiers is governed, in the last instance, by the Phallus. The phallus controls the textual chain; it holds sexual difference in place. If that is the diagnosis of culture, and it is a powerful one, what is the place of the phallus within its own discourse? At most, the anti-representational genre remains equivocal about the place of *this* phallus within their own discourse. It is an equivocation marked by the now-familiar anxiety about the relation between the phallus as a signifier and the penis as a signifier. But it is also traced as an acknowledgement that one's discourse is always-already implicated in phallogentrism. Thus, men's relation to feminism is impossible: to affirm the feminine, to affirm sexual difference is always-already to betray the commitment to feminism.⁴⁰ This would be the

⁴⁰ The necessary impossibility of men's relation to feminism is the well-worked theme of the canonical text in male feminist criticism. See S. Heath (1987) "Male Feminism" and "Men in Feminism: Men and Feminist Theory", in A. Jardine and P. Smith (eds) *op.cit.* pp. 1-32 and 41-6 respectively. For a stark comparison between the anti-

weak form of my argument: equivocation may acknowledge and rupture the phallocentrism but it does not irrupt with a new category of masculinity. A stronger form would be to remark that what takes place is a displacement of the phallus onto the theoretical argumentation. The phallocentrism reestablishes itself and its hierarchies at the level of its theoretical apparatus. Theory once more becomes a legislation. The phallus comes to order not just the object under description, but it also distributes the terms, concepts and categories of the theoretical performance: the father may be dead but at least we (mis)recognise it. It is this displacement of the phallus that makes the genre as a denunciation. As *anti*-representation, *anti*-narrative, *anti*-humanist, it functions as a critique which reverses and thus describes the interests - economic, political, sexual, ethical - of the phallocentric privilege. Such a disavowal - like all readings - have their interests. And that interest has usually been named as a heterosexual presumption.⁴¹ As a presumption, the heterosexual interest is operative at the level of the genre's logic. Phallocentrism is removed from the differential relation between signifiers and is located in the order of logic. The rule and regularity of *theoria* is the structural combination of cognition and misrecognition.

representational genre and the genre of men's studies, cf. V. Seidler (1979) "Men and Feminism", Achilles Heel no. 2 and the elaborations of this argument in his subsequent books.

⁴¹ In the context of the pornography debates, see C. Pajaczkowska (1981) "The Heterosexual Presumption", Screen no. pp. 79-92. For a conspectus of the issues, see T. de Lauretis (1987) "The Female Body and Heterosexual Preesumption", Semiotica vol. 67, nos. 3/4 pp. 259-79. In the context of the genre of male feminist criticism, see the examination of Heath's anecdote of his mother in the various essays collected in A. Jardine and P. Smith (eds) (1987) Men in Feminism.

Let us then leave the logic of anti-representation to its own devices, and turn to its rhetorical question: the subject of signification. What is at issue is the relation not so much between signifiers, but between signifiers and their effects. The question of the subject is the problem of address. It is as a rhetorical problem that the anti-representational genre pays particular attention to the structures of viewing and reading.

The gaze of the reader (and the viewer is typically a reader) is masculine, but it is not masculine because it is a man that looks. Rather the gaze is a structure. Phallogentrism is an apparatus of identification. In this respect, identification is a process which involves the mechanisms of introjection and projection. Both mechanisms work in and through images, concepts, symbols. Thus, the apparatus of film, or literature deploy characters and situations and viewpoints which exploit particular structures of reading. If the subject is to read, if the reader is to be fascinated, if the reader is to become a subject for the apparatus, then these characters, situations, viewpoints must be introjected. In doing so, they become part of the reader's imaginary world, part of what it is to exist as a subject. Conversely, if the apparatus is to come to life, if the apparatus is to fascinate, then the reader must project onto the apparatus aspects of his or her own experience, fantasy or memory. Such a projection endows the apparatus with meaning.

However, the subject does not pre-exist the work of the apparatus. The apparatus does not impose itself on a subject nor does the subject simply impose itself on the apparatus. The subject does not recognise or misrecognise itself in the demand of the apparatus to read in a particular

way.⁴² Rather, the subject is only a subject of phallocentrism. The apparatus - whether cinematic, literary, legal, pornographic - organises the relations between signifiers, and in doing so inscribes its effects on the body of the reader. The masculine subject is incorporated as an effect of signifying practices. The person is a persona, and if it is not, then it does not exist. Masculine sexual identity is a mask or it is not at all. In short, masculine subjectivity is an effect of the self-referentiality of phallocentrism.

What can thus be indicated is that, while the processes of introjection and projection provide the preconditions of identification, it is not these preconditions which provide the violence of identification. Rather, the violence of identification is its attendant process of judgement. In attributing identities, distributing masks, inscribing the phallus, judgement excludes. But it excludes in two senses. In one sense, it excludes by assigning differences to the margins of the phallocentrism. Here, the other is framed as contaminating the very process of judgement. Difference is outlawed because it is set up as antithetical to the very principle which distributes and attributes identity. In other words, judgement has a defensive structure - whether what is to be defended is law, society, masculinity and defended *against* anarchy, disorder, femininity. But difference is excluded in another sense. Here, the effect is not so much to render the other as an outlaw and thus to be measured against the standards of law. Rather, difference is rendered unthinkable. If phallocentrism is the law, then the law cannot imagine its

⁴² This is an implication of the post-structuralist study of masculinity when it simply reverses the recognition that provides the kernel governing of the process of interpellation. Instead of recognition, post-structuralism has tended to write of misrecognition. In either instance, it presumes the possibility of a totalised masculine subject.

Other except in its own terms. If difference has to be explained, then everything about it can be explained in the language of phallocentrism. In short, phallocentrism is self-referential because before it has done its work nothing remains of difference. And after? The subject coughs up his guilt.

In sum, identification is phallocentric when it desires order, closure, fixity, coherence, stability, unity, summation - when it desires judgement. And judgement is a defensive structure. In psychoanalytic terms, it is a process which constitutes itself as a disavowal of castration. The disavowal amounts to a claim that the dissolution of the oedipus complex has *not* taken place. It is against this disavowal that the anti-representational genre of masculinity posits the phallocentric subject as impossible. The subject limps in language, or, in psychoanalytic terms, *he* is always-already castrated. Moreover, if the disavowal of castration constitutes the asymmetrical institution of subjectivity, then the displacement of that structure can only proceed by affirming it. Our fate is to dissolve the Oedipus Complex, to *actively* assume our castration. Only then is it possible to forget our masculine sexual identities.

The Faultlines of Socio-Legal Reason

Such discourses of and on masculinity and sexual politics are the preconditions for the essays that form the thesis. Nevertheless, the essays are addressed to a legal audience. To this extent, they negotiate with a juridical tradition of argumentation and conceptualisation. That tradition represents itself as a mode of socio-legal reason. All three

essays, albeit sometimes obliquely, address the terms and practices of that reason.

The essays were inscribed over a period of seven years. Drafts of the chapters have been put to one side; drafts of other essays not included herein have been waylaid. Such a process of exfoliation is no doubt a consequence of chronology. But more than this, the discourses of feminism, queer theory and, more generally, sexual politics, have undergone over those seven years a process of articulation which has differed and deferred the problems addressed herein. It is this process which is inscribed in the essays - and sometimes unrecognisably so.

What is described however is the legalisation of sexual politics. Sexual politics has been prosecuted in the name of socio-legal reason. Sexual identity is a socio-legal institution, and moreover, an institution which announces the death of sexual politics. This is no more so than when masculinity and sexual identity have been narrativised. As noted earlier, Hayden White remarked that the narrativisation of reality presupposes the value of legality. But it is a legality of a particular form. If, as has been suggested by a number of writers, metaphysics has become jurisprudential, then sociology has become legal and law has become sociological. It is not just that the social is reduced to law nor just that the law is reduced to a codification of the social order. Rather it is the dream of their totalisation which constitutes socio-legal reason. But such a totalisation is impossible; the hyphen marks not the hierarchical conjunction of law and society but the space of their necessary disjunction and oscillation. The suspicion which is thus pursued throughout the essays is the value of a sexual politics framed

as a problem in and for socio-legal reason. The law of masculine difference that is described is not an absence in representation, nor a contradiction in logic, but the emasculation of phallogentrism. The hyphen of socio-legal reason is not only and not always fissured by contradictions, incoherency, indeterminacies. It is composed of faultlines. Faultlines do not take place in the order of logic and reason, the order of common sense - they are not only contradictions, incoherencies, indeterminacies. Rather they *take place* in the order of the real. It is the real that is cracked. Moreover, the faultlines of the real are irreducible to society or to law or to law and society. It is on this basis that the ethical failure of socio-legal reason can be stated. Its desire for closure is a refusal to respond to the radically heterogeneous, to respond to the real faultlines of sexual difference. Such a statement provides the limit of each essay. The rest is a matter of its performance. A solitary formula is reiterated and altered throughout: words peter out.

Chapter Two

FAMILIAR, ALL-TOO-FAMILIAR

incestuous stories of masculine desire

We are going to have a society of dangers, with,
on the one side, those who are in danger, and,
on the other, those who are dangerous.

The enigma is the structure of the veil
suspended between contraries.¹

¹ Respectively: M. Foucault (1990) Politics, Philosophy, Culture, p. 281;
J. Derrida (1974) Glas p.284.

Epigraph

In April and June of 1991, the House of Lords heard an appeal on a point of law, and specifically on a point of the law of evidence, against the conviction of a man for the rape of and incest with his two daughters. The Lord Chancellor, Lord Mackay, had this to say: "In the present case the evidence of both girls describes a prolonged course of conduct in relation to each of them. In relation to each of them force was used. There was a general domination of the girls with threats against them unless they observed silence and a domination of the wife which inhibited her intervention. The accused seemed to have an obsession for keeping the girls to himself, for himself. The younger took on the role of the elder daughter when the elder daughter left home. There was also evidence the accused was involved with regard to the payment for the abortions in respect of both girls."²

The legal argument concerned the issue whether the accounts offered by the two "girls" revealed sufficient "striking similarities" beyond the "stock-in-trade of the paederast and incestuous father" to constitute the necessary proof of rape and incest. The answer given was that "striking similarities" did not need to be proved where what required proof was not so much the *identity* of the perpetrator - in this case it was taken for granted that the identity was that of the father - but rather the commission of the *acts* of rape and incest. The jurisprudential commentators breathed a sigh of relief - no more would they

² R v P [1991] 3 All ER 337 at 345. See also the report and commentary on the Court of Appeal decision in this case at [1991] Crim.L.R. 291.

painstakingly have to winnow the facts to come up with similarities that strike the legal eye with the all the force of evidence, of reasoned facts. At least where what is at issue is not who committed the acts - and with what intention - but rather the nature of the acts themselves. When it is a question of the acts, then evidence that the acts conform to the model of the paederast and incestuous father is sufficient. The effect of such a ruling is to constitute the event, as described by Lord Mackay, as the paederast's or the incestuous father's "stock-in-trade"³. More surprisingly, what the legal institution unwittingly stated in its decision was that it convicted a stereotype. More precisely, the accused found guilty here is a representation, a stock-in-trade, a surrogate. What has been convicted is an image, an effigy.⁴ That effigy incorporates numerous extant formula in the contemporary discourse on incest. In quick succession, the legal decision adumbrates the stock-in-trade of incest as a compulsion to repeat, as violence, as imposed silence, as parental misconduct, as oppression of the daughter by the father, as the disempowerment of the wife, as the inhibition of the mother, as the auto-affection of the father, as an algorithm of Father-Daughter. It is the uses of these formulae in contemporary sexual politics that the chapter addresses as it describes the production of "incest" as an emblematic

3 The phraseology of the "stock-in-trade" abounds in the report of the House of Lords decision. The case itself is the latest in a long line of cases in the formal law of similar-fact evidence which institute the legal person as a sexual type. I discuss these cases in chapter 4, in the context of the homosexual-in-law.

4 Such a literal death of the subject is not that unusual in the annals of the legal apparatus. In 1462, Sigismondo Malatesta was tried in absentia and his effigy - "so exactly rendering the man's features and dress that it seemed more him in person rather than an image" - was placed atop a pyre and burnt as punishment. For discussion of this and related practices of passing verdict and punishment on an effigy, see D. Freedberg (1989) The Power Of Images, pp. 242-82.

figure that is at once all-too-visible and not visible enough. In thematic terms, the chapter moves from the familiar law of self-evidence to the forgotten laws of contingency, from the sight of sexuality to the touch of sexual difference.

The Double Bind of Interpretation

Incest is of mythic proportions. But there is no need to wait on the tale of Laius and his family. We moderns have enough myths to bind us: there are the persona of the paederast and the paedophile, there is the ersatz quality of the stepfather, there is the monstrosity of the child abuser, not to mention the satanic rites and witchhunts. Of course, what is modern about these myths is that as myths they are to be denounced. In the contemporary debates, the mythic dimensions of incest are subjected to a modern mythoclasm. Against the symbolic representations of incest is set the irreducible horror of masculine sexuality. Yet it will not be masculinity itself which is put on display. For the modern rule of evoking horror is not to show the object itself (the Father) but to display its effects on the victim (the Daughter). The Daughter is no more and no less than a surface on which is inscribed our horror of the Father, a mirror to reflect back his violent sexuality. Modern mythoclasm is reflective rather than refractory. If that is one conclusion of this chapter, the conversation will have been a prolonged one - not without its tergiversations.

First detour. It is a conventional wisdom that incest is a hidden problem. The conclusion is then drawn that it is because incest is hidden that we do not speak about it. A first strategy of the chapter will

have been to reverse that conclusion. It is precisely because incest is constructed as a hidden problem that we continue to speak about it. The double bind of interpretation is that incest is both hidden and familiar. Such a bind does not condemn us to silence. It is only on the basis of an unnameable silence that what makes up for that silence can be stated. Indeed, when confronted with the reality of incest, speech must fail. And it is only on this basis that what makes up for the failure can be described. Just as Lacan wrote that it is necessary to recognise the fact that there is no sexual relation before we can analyse what passes for that relation⁵, so we must take the same heuristic point in order to describe the operation of the discourse on incest.

Having started to apologise, I continue as an apologist for a method. I will make some comments about the task I have and have not set myself. They will be brief. As Barthes has noted: method kills⁶. The task I will have set myself is an interpretation of the interpretation of incest. Such a doubling of the interpretive process is not designed to provide a critical survey of the various disciplines that would take "incest" as their problematic object. Such a survey would arrange the numerous perspectives around a given object. In and of itself, the arrangement will have established the advantages and, more insistently, the disadvantages of the perspectives examined. The pay-off is then spelt out - or, at least gestured towards - by making good the faults found. The benefit is an addition of yet one more alternative corpus to

5 J. Lacan (1982) "God and the Jouissance of The Woman", in J. Mitchell and J. Rose (eds) Feminine Sexuality, esp. at pp. 138 and 143.

6 R. Barthes (1986) The Rustle of Language, pp. 69-75; *idem* (1984) Image, Music, Text, pp.

the dead-familiar edifice of commentary upon incest. In other words, a supplementary move tries to establish the originality of the added alternative; and further - that addition would be valued as an improvement. Such immodesty becomes a discourse on incest.

My paper is modest in that it would like to *assume* the double bind of interpretation. Which is to say, it reads. By taking the discourse at its word, the discourse on incest is re-arranged, re-described, re-written. Such a re-description requires attention to the economies of the discourse. I have two in mind. One economy would be that put into effect in elaborating the "themes" or "myths" of incest (for example, "violence", "sexuality", "collusion"). These could be called the economies of ontology. Their repeated question: what is it! As Cixous has argued, as soon as you have asked that question you are putting into play a masculine economy⁷. The other economy is that by which the themes are take place - the way in which the themes are linked, juxtaposed, separated. Incest is staged as a narrative - of origin, of feminism, of authority, of patriarchy. Drawing on Goffman's vocabulary, this narration of the themes may be called the economy of frame⁸. An example of a framing device would be these introductions in that they try to arrange in advance the argument that is to ensue. The purpose of attending to frames is to see where they break down, where they bleed -

7 H. Cixous (1986) "Sorties", in H. Cixous and C. Clement, The Newly-Born Woman, at p. 64: "as soon as the question of ontology raises its head, as soon as one asks oneself 'what is it?', as soon as there is intended meaning. Intention: desire, authority - examine them and you are led right back ... to the father."

8 For an explicit theoretical statement of a position which is deployed throughout most of his micrological analyses, see E. Goffman (1986) Frame Analysis, esp. chaps. 5 & 10.

where the discussion that follows does not conform to what is predicted by *this* introduction.

The discourses on incest invariably confine themselves to, posit an ontology. The disputes concern themselves with what is, and what is to be done about, incest. The critical element of the definitions involves setting up incest as a commonplace fact of contemporary society, a self-evident phenomenon, and thereby continually repeated. Explanations are then given which are designed to avoid that repetition at all costs. As Campbell writes in the introduction to her book Unofficial Secrets: "[T]he contradiction of Cleveland is that society has demanded that the professionals *do* something about child sexual abuse, and yet it won't forgive them when they do or when they don't. This book is about that - what it tries not to do is repeat the way the whole Cleveland debate became professionalised and proceduralised."⁹ Such a disavowal of repetition constitutes the desire for change. Paradoxically, however, it is that desire for change which re-installs the self-evidence of the discourse on incest - in as much as both the mechanism of self-evidence and of change is posited as the denial of incest. In other words, the double bind of interpretation is that the precondition of interpretation is repetition.

An earlier version of the chapter was presented at a conference. After I had finished speaking, a first intervention questioned me as to what I was saying about the "connection and interconnection of bodies". Somewhat confused, I requested further clarification; my interlocutor

⁹ B. Campbell (1988) Unofficial Secrets: child sexual abuse: the Cleveland case, p. 13.

repeated the question word-for-word. I had no answer. The chairperson brought the session to a close. With hindsight, the question posed uses the body to foreclose, to leap out of the circle of repetition. As a referent, however, the body is empty.¹⁰ It has to be produced. In other words, the accent in my reading falls on the *saying* of incest rather than the body of incest. This does not involve the promotion of incest, nor is it a denial of the reality of incest. We are not - or not only - suspended between these two alternatives. In fact, the tyranny of thinking about "incest" is precisely the suggestion that these are the only choices available - either denial or promotion. It is *unquestionable* that we can only deny or promote. That is beyond question, irreducible. By insisting on the *saying* of incest, I would like to redirect this impasse, this dead-end, towards another question.

It is that which constitutes the immodesty of my re-description; namely, it wants to question the unquestionable, to read literally the unread. I would like to make room rather than a home in the proliferation of stories about incest. More specifically, the repetition of interpretation does not have the perfection of a circle. Rather, the self-evidence of incest is aporetic. And if that self-evidence is a denial of incest, it is not simply prohibitive. Rather, through its prohibition, it promises change - a reopening of *the question* of politics¹¹. It is this necessary possibility

¹⁰ This is the lesson of Mauss's description of the body as a technology. See M. Mauss (1979) *Sociology and Psychology: essays*. See also M. Foucault (1979) *Discipline and Punish*, pp. 135-141, discussing practices of dressage which work the body "retail".

¹¹ That self-evidence is not a simple suspension of signification or politics, I take to be the import of Derrida's description of aporosity as that which "evokes, rather than prohibits, more precisely, promises through its prohibition, an other thinking, an other text, the future of another promise. All at once the impasse (the dead-end) becomes the most 'trustworthy', 'reliable' place or moment for reopening a question

which is put to one side in the discourse on incest. At which point, I abandon the position of an apologist for a method.

Repetitions and Suspensions

The wholly other announces itself
within the most rigorous repetition.¹²

Some eighteen years before incest became a crime in the secular calendar of England¹³, (General) William Booth of the Salvation Army published his manifesto of social reform, In Darkest England and the Way Out. As the title suggests, Booth conceives his work in terms of an extended analogy between "Darkest Africa" and "Darkest England" - specifically, between Mr Stanley's journey into the Congo forests and a trip into the wastelands of metropolitan England. That analogy has several elements, but primarily it imagines metropolitan England as an immense forest that is all but impenetrable. It is closed to the imagination, and the analogy will "bring home to us the full horror of that

which is finally equal to or on the same level as that which remains difficult to think". See J. Derrida (1986) "Acts", in Memoires for Paul de Man, at p. 134.

12 J. Derrida (1989) Of Spirit, p. 113.

13 The Punishment of Incest Act 1908. Extended discussion of this Act is rare. For socio-legal commentary, see V. Bailey and S. Blackburn (1979) "The Punishment of Incest Act 1908: a case study in law creation" Crim. L.R. 749-64; S. Wolfram (1983) "Eugenics and the Punishment of Incest Act 1908" Crim.L.R. 308-16. For an antiquarian consideration of the consequences of the Act, see J. Morton (1988) "The Incest Act 1908: was it ever relevant?" New Law Journal, 29 January. The rather longer criminal legal history of incest in Scotland is anecdotally recounted in Mason, J. (1981) "1567 and All That", Scots Law Times Reports, 18 December, p.301-4. More comprehensively, see V. Bell (1991) Ph.D thesis, University of Edinburgh.

awful gloom"¹⁴. It is a place where "the rays of the sun never penetrate", a place of "dark, dank air, filled with the steam of the heated morass" (B 9). But more than this, the inhabitants of the metropolis are "filled with a conviction that the forest is endless - interminable": in vain do the social reformers "endeavour to convince them that outside the dreary wood were to be found sunlight, pasturage, and peaceful meadows" (B 9). No doubt, such an anthropological metaphors is enough to call for comment in itself, but what interests me here is Booth's statement, in his chapter VIII "The Children of the Lost", that "[t]he overcrowded homes of the poor compel the children to witness everything. Sexual morality often comes to have no meaning to them. Incest is so familiar as hardly to call for remark." (B 65; "The Curse Upon The Cradle" is the marginal heading for the page.)

In two hundred and eighty five pages, this is Booth's only mention of incest. As Foucault has noted, "incest was a popular practice ... widely practiced amongst the populace, for a very long time" and that "if you look for studies by sociologists or anthropologists of the 19th century on incest you won't find any. Sure, there were some scattered medical reports and the like, but the practice of incest didn't really seem to pose a problem at the time."¹⁵ One is familiar, we are so familiar with incest that we do not have to speak about it. At least "hardly" ever. Something in the very familiarity of incest resists the desire to be left unremarked. It is this "something" which will be taken up towards the

¹⁴ W. Booth (1890) In Darkest England and The Way Out, p.9. All further references to Booth will be included in the main text, preceded by the initial B.

¹⁵ M. Foucault (1990) op.cit. p.302.

end of the nineteenth century in England as various social movements problematise the extent of incestuous practices - and sometimes their anthropological universality. Incest, though familiar, remains enigmatic - and thus calls for comment and prohibition¹⁶.

It would seem then that the figure of incest is suspended between the familiar and the enigmatic, between the visible and the invisible, between silence and speech. It is as a suspended figure that "incest" can be a productive story. In recent years, Britain and North America have been subjected to a series of scandals, whose most conventional term is a "child abuse" haunted by "child sexual abuse". In Britain, these scandals have taken their names from the places with which they are linked - Cleveland, Orkney, Rochdale, Nottingham. In North America, the scandals have been named by reference to a main participant - the McMartins, Steinberg and Nussbaum, Woody Allen. Hacking notes this continental difference in the context of the Cleveland affair: "unlike nearly all previous child abuse "events" outside the United States, it was completely *sui generis*, not patterned on American experience ... In America, a new child abuse scandal provokes untold rage against the accused; in Britain, it was the pediatricians and social workers who were bitterly hated. The total number of words published in the United Kingdom, on the topic of child abuse, doubled in eighteen months, all thanks to the one issue."¹⁷ Three terms should be noted in the debates:

¹⁶ Foucault makes this link between incest as a practice, incest as a language and incest as that which is prohibited, when he comments: "it is clear that the great interdiction of incest is an invention of the intellectuals": M. Foucault (1990) *op. cit.* p. 302.

¹⁷ Hacking, I. (1991) "The Making and Molding of Child Abuse", *Critical Inquiry* vol. 17, p.253-88 at p. 256. This is the best account of "the malleabilities of the idea of child abuse" in North America. For Britain, see B. Campbell (1988) *op.cit.*; Department of Health and Social

"incest", "child abuse", both of which have retrospectively taken on a sexual connotation in the overarching term of "child sexual abuse". More specifically, child sexual abuse is the contemporary name by which incest is extended. In fact, much of the contemporary debate may be characterised as a struggle to re-define and thereby extend the scope of the problem to be recognised - by academics, by police, by social workers, by doctors.

The modern story runs as follows. Everybody knows of the existence of incest. This familiarity produces an immunity to the self-evident horror of incest. As a result of this immunity, the problem of incest is submerged in silence. Further, as a silenced problem, incest is continually repeated. Thus, one strand in the contemporary story: *familiarity breeds silence and silence breeds incest*. What is to be done about the problem provides the denouement. The denouement is a counter-story. For ease of reference, I call it a discourse of revelation. One must speak in order to solve the problem of incest. One commentator confesses: "This book arose out of the desire to inform, to destroy prejudices, to counteract the widely-accepted caricatures and half-truths about abnormal sexual behaviour"¹⁸. The critical imperative to speak about incest is formulated as a violent unveiling of the truth. Inversely, incest calls forth, demands that it be spoken about. Incest authorises speech and is the justification for speech. For Hall Williams,

Security (1988) Child Abuse in Cleveland, 1987: Inquiry Report. More generally, see N. Parton (1991) Governing the Family, esp. chaps 3-5 for a conspectus of child abuse and child sexual abuse.

18 H. Maisch (1973) Incest, p. 216.

in his articles on incest and its neglect in English law, the criminologist is "bound to say".¹⁹ Incest is the demand to speak.

The counter-story and its demand can be spelt out in the context of the Cleveland crisis. The crisis was formulated not so much in terms of the existence of child abuse, but rather in the neo-liberal terms of an illegitimate intervention of the State into the parental function. The State was represented by the local government, acting on the recommendations of their own Department of Social Services and the paediatricians Higgs and Wyatt. As the Daily Mail put it, in its front page headline, "HAND OVER YOUR CHILDREN, COUNCIL ORDERS PARENTS OF 200 YOUNGSTERS"²⁰. In short, the crisis was formulated as a management problem. It is in these terms that the subsequent Inquiry, chaired by Butler-Sloss LJ, would take up the Cleveland Affair. Much has been written about how Cleveland concerned the co-ordination and inter-relationships between the various agencies that problematise child (sexual) abuse: welfarist, police, medical. While this aspect is undoubtedly important - and not only because the inter-agency co-ordination excluded feminist groups - for my purposes, it should also be noted that "management" was problematised in terms of its evidential technologies. As the Report of the Inquiry states, the issue was "the difficulties of recognition of sexual abuse and the threshold of suspicion at which action was to be taken"²¹. The language used is the language of legal proof, a language

¹⁹ J. Hall Williams (1973) "Incest in English Law", in H. Maisch, op.cit. p.219-28 at 227, and *idem* (1974) "The Neglect of Incest: A Criminologist's View", Medicine, Science and the Law vol. 14 pp. 64-7.

²⁰ Daily Mail, 23 June 1987.

²¹ Department of Health and Social Security (1988) op. cit. p. 11.



structured by a valuation of the *search* for truth over the truth itself. In this instance, the prevalence of the sexual abuse of children in Cleveland, and for that matter in Britain, was put to one side. Making up for it, there was an interrogation of the social workers' technique of "disclosure" and the paediatricians' *diagnostic* technique of "reflex anal dilatation". In respect of the latter, an article in the medical journal The Lancet in 1986 had suggested that the inspection of the anus could be put to forensic purposes and, in particular, to the detection of "buggery in infancy and early childhood"²². The body - and particularly the anus - is constituted as an expressive symptom behind which can be detected the obscure workings of a paederast. According to Parton, "Sexual abuse, unlike physical abuse, often presented itself in a veiled way"²³. It thus requires a discourse of revelation. And that revelation leads to what is to be done, what is to be *changed*.

A dispute over the techniques which would bring to light (*e-videre*) child sexual abuse was thus a crisis in the management of abuse. The dispute between the professional disciplines was formulated on the terrain of evidence, on the terrain of a search for the truth. According to police procedures, an investigation - consequent upon a confession and/or complaint - would be the only valid method of unveiling incest. Only on this basis could the perpetrators be prosecuted. According to the paediatricians, the examination of bodily signs would reveal the

²² C. Hobbs and J. Wynne (1986) " Buggery in childhood - a common symptom of child abuse", The Lancet, 4 October, pp. 792-6. See also the response to this article by R. Roberts (1986) "Examination of the anus in suspected child sexual abuse", The Lancet, no. 8, November p. 1100.

²³ N. Parton (1991) op. cit. p. 87

existence of child sexual abuse. As Campbell aptly puts it, "The anus announces its own history of abuse"²⁴. On this basis, the appropriate department of the local council could be notified and some 121 children taken into care and/or hospital. The social workers and therapists were the other main group of professionals involved. Here, the technique is "disclosure". A term of art in the therapeutic and social work professions, it is akin to the "talking cure" of ego-psychology. But the revelations are not confined to the order of speech. It can use various devices - often in combination - ranging across formal interviews, informal discussions, drawings, and anatomically-correct dolls²⁵. Whereas with the other professional techniques the revelation and the consequent change are kept institutionally but not epistemologically distinct, disclosure is a revelation which at one and the same time is a salvation. Disclosure *is* change. But not quite. The counter-story involves an imperative to speak, to tell all. That evidential speech will counter the silence in which incest is submerged. Yet to speak is to advance the claims of the familiar; and the familiar, as we are told at the beginning of the story, breeds silence. The disclosure is thus always already at a loss: to reveal incest is to promote the problem which the revelation is intended to solve. All that remains is an endless speech: every revelation producing more silence which calls forth more revelations. In short, the critical discourse displaces the identity of incest and puts into play a logic of repetition.

²⁴ B. Campbell (1988) op. cit. p. 3

²⁵ The drawings of children became the subject of a great deal of media attention in the revelations of "Satanic Abuse" in Rochdale. On the use of anatomically-correct dolls, see A. Bentovim *et al.* (1988) Child Sexual Abuse Within the Family.

The play between the familiar and the enigmatic functions other than to ascertain the identity of incest. Rather, it is as if the problem of incest provides a path whereby other issues can be rendered unto discourse. As if incest is an allegory of origin - the origin of a scientific discipline, the origin of an individual, the origin of society. Let us note each of these.

The first article in the first volume of the journal L'Annee Sociologique is published under the signature of Emile Durkheim. The article is, at least explicitly, on the nature and origin of the prohibition against incest. For the putative 'father' of sociology, the ban on incest poses a question of knowledge. Durkheim notes that the problem of incest labours under a continuing irresolution despite it being a familiar object of investigation and interrogation. Many have tried to solve the problem and none have succeeded. Faced with this continuing riddle, Durkheim proposes that Sociological Method will have provided the answer. In other words, the question of incest becomes the site of a demarcation dispute within the human sciences as sociology attempts to establish its own distinctive terrain. Sociology's claim is to be the inheritor of an endless speech; and it is the "problem" of incest which will have established that inheritance²⁶.

²⁶ E. Durkheim (1963) Incest: The Nature and Origin of the Taboo. It is possible to force Durkheim's moves here into a homologous relation with the story of Oedipus. The riddle of the Sphinx is pre-eminently a riddle of knowledge just as for Durkheim incest is translated into a question of sociological knowledge. Further, through such translation, Durkheim claims to be the inheritor of the incest problem. As such, the father of sociology would also, in establishing that paternity, take up a filial position. Put another way, the son becomes the father by way of laying claim to the technical means of solving the problem of incest. In a psychoanalytic story, sociology would conform to the position of the mother. In other words, Durkheim's desire for a sociological solution to incest re-presents a desire for the mother. Sociology is thus an incestuous project. Such a homology is too forced. For a similar forcing,

Turning to psychoanalytic psychology, incest will also be located at the origin. On its terms, it is as if "incest" provides an economy measure, a short-cut to the condition of civilisation and to the condition of the individual. An originary incestuous wish or behaviour will explain a later individual pathology and normality. Additionally, the ban on incest is positioned at the origin of the social. Against the normalising tendency of this narrative, one genre of a feminist discourse re-writes the psychoanalytic myth of Oedipus. Ward proposes incest as a representation of patriarchy in its most malign and typical form: "[Father-Daughter] rape is the end result of the dehumanised authoritarian social structure called patriarchy, through which the Son becomes the Father by rejecting his Mother and thereby gains unfettered access to the Daughter."²⁷ As Ward's capitalisations indicate, the re-writing of Oedipus identifies the individual with the structure. Here, father, daughter, mother and son operate as positions. The myth thus assigns individuals to functions within a phantasmatic co-ordination of relations between positions. What I will have occasion to note is that the co-ordination of the mother-daughter relation remains unnamed but haunts Ward's re-writing. Instead, like much of psychoanalysis, the story is told from the child's - and specifically the son's - point of view. As such, the particular spin which Ward puts on the Oedipus myth of psychoanalysis is to name it as patriarchal, but without changing the co-ordination of

see Land, N. (n.d) "Kant, Capital, and the Prohibition of Incest" Third Text vol. 5, pp. 83-94, where the structure of the categorical imperative is said to conform to the structure of the incest prohibition.

27 E. Ward (1984) Father-Daughter Rape, p. 201.

functional positions in the myth. The natural scandal of incest remains the cultural scandal of patriarchy.

If for Ward the outrage of incest is the patriarchal convergence of nature and culture, then it remains to point out that for Levi-Strauss, the scandal of the incest *prohibition* is the same convergence: "the incest prohibition expresses the transition from the natural fact of consanguinity to the cultural fact of alliance".²⁸ Of course, as Derrida has noted, it can only be a scandal from the perspective of oppositions, "a system of concepts which accredits the difference between nature and culture". But here a difference between Ward and Levi-Strauss should be registered - that, for Levi-Strauss, although there is an accreditation, the alternative is not simply to discredit. Thus, "Levi-Strauss simultaneously has experienced the necessity of utilising this opposition and the impossibility of accepting it."²⁹ Both the experience and the prohibition of incest provide a short-cut through which we speak about the problems of humanity. The possibility of incest reveals the possibility of being human. Yet the short cut, the revelation, is an impossible one. The discourse on incest is suspended between the familiar and the enigmatic, silence and speech, nature and culture: "[t]he collective anxiety, panic and confusion set off by discussion of child sexual abuse can be seen as the unsurprising response to the challenging of a founding idea of our civilization: that incest is the boundary between

²⁸ C. Levi-Strauss (1969) The Elementary Structures of Kinship, p. 30.

²⁹ J. Derrida (1981) Writing and Difference, p.283.

stability and chaos. If, as the supposed facts show, incest is rife everywhere, then chaos is foreclosing on us."³⁰

We are now in a position to re-mark the placing of masculine sexuality within these debates. The discourse on incest also provides a short-cut to the problem of masculinity and, as I will spend some time describing, masculinity is a suspended figure - it falls between father and daddy. Initially, however, it is necessary to note a symmetry between the discourse on incest and a more generalised discourse on masculinity.

In the middle of an extensive feminist prospective history of contemporary approaches to child abuse, MacLeod and Saraga comment that they are "able to do little ... to remedy" the hiatus in the debates, but that "we can point the way forward and hope that the new flowering of publications on masculinity will shed some light on why so many men abuse their own and other children".³¹ In the publications to

³⁰ M. MacLeod and E. Saraga (1988) "Challenging the Orthodoxy: Towards a Feminist Theory and Practice" Feminist Review, no. 28, pp. 16-55 at p. 29.

³¹ M. MacLeod and E. Saraga (1988) op.cit. p. 14. The efflorescence of publications on masculinity is too long to mention all of the relevant texts. They emerge as a counter-cultural and socialist response to radical feminism in the mid-late 1970s - the magazine Achilles Heel is exemplary. For a selection from the magazine, see V. Seidler (ed) (1991) The Achilles Heel Reader, and *idem* (ed) (1992) Men, Sex and Relationships. By the late 1970s, the flowers begin to bloom on academic soil. Two texts are representative: A. Tolson (1977) The Limits of Masculinity; and A. Metcalf and M. Humphries (eds) (1985) The Sexuality of Men. More recently, V. Seidler and J. Hearn have made the subject their own with a series of books and articles too numerous to list but which are included in the bibliography. For a Foucauldian inflection to such a sociology of masculinity, see A. Brittan (1989) Masculinity and Power. Alongside such "men's studies", there has also emerged - in film and cultural studies - a semiotics of masculinity. In this respect, see N. Hertz (1983) "Medusa's Head: Male Hysteria Under Political Pressure", Representations, no. 4, pp. 63-72; A. Jardine and P. Smith (eds) (1987)

which MacLeod and Saraga hand over their hopes for a phoenix that will rise out of the ashes of the debates, masculinity and its attendant sexualities has become an urgent problem. The presumption of a male sexuality that sees itself as subject and everything else as object, has dominated cultural expression for too long. At the same time, it has remained invisible and with terrifying consequences - not only for men but also for their significant others. Its presumption and the horror of masculinity can no longer remain unnamed. The steps and the turns of this discourse on masculine sexuality can be briefly set out.

Masculine sexuality is a familiar event. It is a banal truth that rests secure in its self-evidence. Its very banality, in fact, means that it is unremarkable. Masculine sexuality thus implodes with silence, with the devastating effect that the patriarchy - or, in more conventional terms, the phallogentric system - is repeatedly affirmed. The familiar breeds silence, and silence engenders a masculinity which at one and the same time must deny its emotions and oppress women. The counter-story will thus have patiently revealed the silence of masculinity. "It is time to try to speak about masculinity, about what it is and how it works."³² The horror of the masculine is repeatedly announced and

Men In Feminism; J. Boone and M. Cadden (eds) (1990) Engendering Men; T. Modleski (1991) Feminism Without Women; the special issue of Camera Obscura, vol 17 "Male Trouble"; and K. Silverman ((1992) Male Subjectivity At The Margins.

32 A. Easthope (1986) What A Man's Gotta Do: The Masculine Myth in Popular Culture, p.1. Cf. P. Smith (1988) "Vas" Camera Obscura no. 17, pp. 89-111, who comments on Easthope's attempt to critique male sexuality in popular culture: that it is "[a]ll too easy to guiltily take to heart the often repeated feminist *charge* that men have yet to speak about their sexuality - and then give forth a few heartfelt mea culpas. In fact (or as experienced, rather), male sexuality is both difficult and deadly easy" (p.89, italics added). Smith then styles his article as a dialogue which answers what is now, not a feminist charge, but a "feminist *complaint*" (p.90, italics added). On the tradition of the female

denounced. However, to speak is to advance the claims of the familiar, the banal and, as such, according to the terms of the initial story, the horror is once more submerged in silence. As in the discourse on incest, masculinity is always already at a loss. What is revealed is not so much a heretofore hidden reality, but the *concealment* of male sexuality. The revelation is always already a re-veiling. According to a semiological intervention, the crisis of masculinity is a crisis of representation. As representation, masculine sexuality is a phantasm which condenses and displaces the trauma of the real. As such, there is no way through the concealment of masculinity to which the sociology of masculinity has addressed itself. Instead, masculinity *limps in* the language of representation. And when addressed to feminism, it is an "impossible" relation.³³ The acknowledgment of this impossibility is not pitched at the epistemological level. If it was, it would amount to little more than an ambiguity introduced into the discourse on masculinity by the yawning chasm between representation and reality, phantasm and trauma, myth and experience.³⁴ Rather, the reality of incestuous masculinity is

complaint, a useful conspectus is L. Berlant (1988) "The Female Complaint", *Social Text* no. 19/20, pp. 237-59.

33 "Men's relation to feminism is an impossible one": this is the first sentence of Heath's now infamous article "Male Feminism" in A. Jardine and P. Smith (eds.) (1987) *Men In Feminism*, pp.1-32. Many of the essays in this collection address themselves explicitly to Heath's arguments, and more generally to the trope of "difficulty" which has characterised both the sociology of masculinity and the semiotics of masculinity. In this respect, see the essays in the collection by Weed, Jardine, Smith, Miller, Kamuf.

34 Such an epistemological interpretation organises the essay on child sexual abuse in C. Smart (1989) *Feminism and the Power of Law*, ch.3. The organising trope of this essay is the possibility of recovering "the child's voice" and thus the necessity "to tackle the problem of masculine sexuality" (p.65). In the hands of Smart's anti-essentialist enthusiasm, such an appeal to the necessity of work turns post-structuralist *thinking* into little more than a *techné*.

irrecoverable but nevertheless operative. In other words, the impossibility is ontological and ethical. The manoeuvres are made in terms of the opposition between knowledge and action, between "what is incest?" and "what is to be done about incest?". I will repeat them here.

It was noted in the earlier discussion of Cleveland that the discourse of revelation formulates the relation between knowledge and action as a conjunction. To reveal the problem of incest would be to solve the problem of incest; to demonstrate its existence is to establish the framework within which remedial and preventive action can be taken. But, as MacLeod and Saraga acknowledge, "[d]isclosing, talking, telling is important in challenging the power of the secret, of shame, in facing and confronting the pain, and in reaching catharsis, but it is not everything and it may not be enough."³⁵ However, this ethical failure is dramatised across the discourse on incest. Action - whether that be the action of the perpetrator of incest, or the action of social workers and doctors, or of the victims of incest - does not follow on from knowledge. It is in this sense that the crisis of masculinity is also the crisis of Oedipus. Oedipus does not recognise the image of his father in Laius at the crossroads, any crossroads, and thus kills him. He does not recognise the image of his mother in Jocasta, and thus marries her. This failure *in* recognition is an ethical aporia. The Oedipal story, as much as the crisis of masculinity, dramatises the disjunction between *logos* and

³⁵ M. MacLeod and E. Saraga (1988) op.cit., p.49. Smart stylises this aporia as a "conundrum": "for how is it that children can be said to be silenced if in fact they are encouraged to tell their story over and over again?". It is a rhetorical question and thus institutes a closure. Attention its rhetoric will have unravelled Smart's insistence that it is the voice of the child that is repeatedly silenced: C. Smart (1989) op.cit. p. 69.

pathos, theory and practice, knowledge and action. The actions of Oedipus do not follow on from knowledge, but from the impossibility of knowing. And any nostalgia for a return to the real beyond representation - the reality of the child's voice or the reality of masculinity - is doomed to repeat the tragedy of Oedipus. The real simply and unalterably, unutterably, falls outside language. The remainder of the chapter will have insistently traced the necessity of this ethical aporia in the discourse on incest and masculinity.

A Familiar Constellation

"What is wrong with incest?" is the rhetorical question which gives Frances Wasoff the title for an article. She addresses the question to a legal and criminological forum - and particularly legal and criminological practitioners³⁶. It is also rhetorical in the wider sense in that the question is addressed to herself - the task of the article is to answer the question of the ethical wrong embodied in incest. The answer is brief and quickly stated: "incest is one aspect of violence in the family which reinforces male domination."³⁷

The theme is a putatively feminist one and it obtains at least part of its force from the way it arranges the incestuous problem. In the

³⁶ One reader has suggested that such a practical address would be uninterested in my description of the discourse on incest. The significance of Wasoff's essay for my argument however is to note the way its address is structured. And more appositely, to trace the play within this structure. The argument would thus be that specific legal interventions must negotiate with the play internal to the structuring of incest.

³⁷ F. Wasoff (1980) "What is wrong with incest?" Scolag Bulletin, vol.47, pp.112-5 at p.113.

arrangement, two narratives of incest are placed in opposition with each other. On the one hand, there is the "composite picture of the incestuous family". Here, I quote from a much-quoted feminist psychiatric account given by Herman.³⁸ The author identifies the parts to this holistic family as patriarchal father and possessed daughter. The same familial figures, but this time written in capital letters, are provided in a sociological account by Ward.³⁹ The argument describes incest as a problem internal to the family - and in particular, as the genealogical coordination of mother, father and child. Genealogy is a question of descent, of drawing a line from parent to child. As filiation, its primary connotation is masculine - the child is a son. The filial position of the daughter has been erased. The feminist descriptions of incest thus initially resurrect the issue of the daughter's filiation. However, they are then confronted with a narrative of father-daughter incest from which they must distance themselves.

What is to be rejected is the structuring of familial positions according to the motifs of seduction, collusion, and haplessness. It is proposed that father-daughter incest is possible because the daughter seduces the father and subsequently, father and mother collude in covering up the event. As a character in this conventional story, the father has two positions: as husband to the wife, he is an active

38 J. Herman (1981) Father-Daughter Incest. The phrase extracted comes from the back cover blurb: "through an intensive clinical study of forty incest victims and numerous interviews with professionals in mental health, child protection, and law enforcement, the author develops a composite picture of the incestuous family." For a more concise statement of their argument, see J. Herman and L. Hirschman (1977) "Father-daughter incest" Signs vol.2, pp.735-56.

39 E. Ward (1984) op.cit.

conspirator in the obfuscation of incest; and as father to the daughter, he is a passive victim, drawn to commit a crime by her irresistible attraction and the demands of his appetite. In the counter-story, it will have been the daughter who occupies two positions. But we should also note that, in the conventional story, the scandal of incest is that the direction of the genealogical axis of descent has been turned around: rather than the father passing on his name and heritage to the daughter, it is she who has captivated him. And further, the filiation of mother and daughter has been abjured - the formula of collusion is that it rejects the mother-daughter relation in favour of the wife-husband relation. The effect of collusion is thus that incest is hidden *within* the family.

Having resurrected the genealogy of father and daughter - after all, it is primarily fathers who are the abusers, and daughters who are the victims - Ward and Herman build their story as a counter-story. Against the hapless father, they write of the abusive father. Against the seductive daughter, they position the daughter as victim. And against the collusive mother (wife), they offer up the dominated wife. The counter-story thus re-establishes the genealogical line of incest as flowing from the father *to* the daughter. Filiation is incest is patriarchy: the ascendancy of the son to the paternal position is a continuation of the filial line not only between father and son but also between father and daughter. And whereas the formula of collusion cuts off the mother from the daughter, the counter-story resurrects the mother against the wife and formulates the mother and daughter as sharing an identity by virtue of their common oppression at the hands of the father.

The feminist story as counter-story thus pivots on the genealogical relation between father and daughter. What is displaced and comes to haunt the counter-story is the spectre of collusion. In the counter-story, the wife no longer colludes with her husband, a collusion which buries the mother within the function of wife. Instead, as mother, she colludes with her daughter - but the collusion is affirmed as *sororal* identity. As such, the counter-story buries the mother within the function of sisterhood. The adult female can be either "wife" or "sister". The mother will have haunted the counter-story as a *specific* function disrupting the representation of incest.⁴⁰

Related to this irresolution of collusion is the question of intervention, of what is to be done about incest. The formula addresses the issue of what is to be done about incest. In the conventional story, collusion is used to establish the necessity of intervention from outside the family. Nobody in the family would do anything about incest - either taking it for granted or, aware of its prohibition, taking positive steps to keep it hidden from prying eyes. As such, it is a range of professionals, extra-familial professionals which will reveal the problem by intervening in the family. But this imposition is not simply an imposition. It takes as its *sine qua non* the necessity of obtaining an ally within the family. By way of a negative example, the crisis of Cleveland was a crisis in such a

⁴⁰ Montrelay has styled this specificity of the mother as the enigma of the Sphinx, as that which prompts the collapse of the symbolic dimension of incest: "Does not the enigmatic figure of femininity [the sphinx] menace every subject? Isn't it this figure which is at the root of the ruin of representation?". See Montrelay, M. (1977) *L'ombre et le nom*, p.66. Cf. the excavations of the specificity mother-daughter relation in L. Irigaray (1986) *Speculum of the Other Woman*. And the notion of the "equivocal" of the mother in H. Cixous (1981) "The Laugh of the Medusa", in E. Marks and I. de Courtivron (eds) *New French Feminisms*, pp. 245-64.

solicitation of the family. The figure of the parent is a figure of the familial refusal of the blandishments of the social workers and doctors. Similarly, what is posited as a breakdown in inter-agency co-operation may be understood as a failure of the doctors and social workers to solicit co-operation from within the family. In short, then, the story of collusion specifies a strategy of intervention which is necessarily extra-familial, but which must at the same time solicit intra-familial co-operation. What then happens to this strategy when the counter-story denies collusion as a myth?

As a preliminary point, it is to be noted that the counter-story of incest is always troubled by *any* recourse to legal and welfare intervention. This may be read as one effect of the denial of collusion. In denying the collusion of the wife with the husband, the counter-story closes off the possibility of outside intervention which the formula of collusion attempts to specify. This is not to say however that the counter-story does not have its own proposal for what is to be done about incest. Not surprisingly, it is the formula of sororal identity which specifies an alternative strategy of control. Recourse to outsiders will not be necessary - or at least insufficient - in discovering incest because the sororal bond between mother and daughter is established in their shared revelation of incest and domination. The revelation of incest therefore comes from *within* the family. And since it is the revelation of incest which promotes its change, what is to be done about incest will also have been a familial affair. Intervention will begin intra-familially, and from that place will determine the operation of outside intervention. If evidence be needed, it is a little remarked fact that, in legal cases, the network of communication in which incest is rendered visible travels

from daughter to mother and from mother to social workers and/or police. In short, the denial of collusion and the promotion of a sororal identity shifts the priority from the outside to the inside. That shift pivots on the mother's revelation. Paradoxically, it had been the mother to which social workers had directed much of their attention. In the conventional story, the formula of collusion specifies that it is this collusion that had to be disrupted by enticing the mother-wife to side with the social worker rather than the husband-father.

No doubt such a claimed alliance between the mother and welfare professionals is subject to the criticisms that have been made of Donzelot's work on the history of family government⁴¹. No doubt, the formula of collusion is a sexist formulation. But to condemn it as self-evidently sexist is to displace the *question* which it is addressing.⁴² Minimally, the effect is that the counter-story disarms itself from addressing that question. Maximally, the effect is that it comes perilously close to proposing a mode of intervention which continues that specified in the formula of collusion. Intervention pivots around the place of the mother - and the difference is that the conventional story targets the relation of the mother to her husband, whereas the counter-story targets the relation of the mother to the daughter.

⁴¹ The claim of an alliance between the mother and the state has been the subject of much dispute in respect of the work of J. Donzelot (1980) The Policing of Families. See the editorials in Power & Politics, no. 3; F. Bennett, B. Campbell and R. Coward (1981) "Feminists - The Degenerates of the Social?", Power and Politics, no. 3, pp. 83-92; and M. Barrett and M. McIntosh (1982) The Anti-Social Family.

⁴² Out of an anxiety not to be misread, I rewrite: it is the question of intervention which needs to be opened - rather than closed as in the denunciation of collusion as a myth. This is not to condone the strategy specified in the formula of collusion, but rather to prompt its specification.

More generally, incest as a problem of governance remains a problem of family genealogy - a question of the arrangement of functions within the family so that the transmission of the family name is guaranteed. The above description argues that the mother - or more precisely, the function of "mothering" - is accorded a pivotal role in this transmission. It is in this strict sense that the interrogation of the mother is a return of the filial position of the daughter.

However, as I will describe, the daughter is placed in an impossible position. But for the moment it is necessary to note that, in the counter-story, the rescue of the daughter is a denunciation of the father - denunciation which also returns incest to the family orb.

The first move is to parody the conventional story. The conventional story is set up as proposing that incest is extrinsic to the family. Such excentricity is to be found in the description of incest as a family dysfunction, but also in the description of the incest perpetrator as a "stepfather" or a "monster"⁴³. If incest is found then, by definition, there is no family - a family that is dysfunctional is not a family, or an abuser who is a "monster" is not a member of the family. Having

⁴³ It is interesting to note that, in Britain, it was the figure of the stepfather that was repeatedly used in the 1980s and is again being deployed in the 1990s. The most useful compendium of stereotypes and myths can be found in S. Nelson (1987) Incest: Fact and Myth. For the family dysfunction theories, an exemplary collection of essays is R. Porter (ed) (1984) Child Sexual Abuse Within the Family. An excellent feminist critique and survey of the field is M. MacLeod and E. Saraga (1988) op. cit. esp. pp. 31-35, where they conclude that the dysfunctionists have it back to front: "The incestuous assault could be described as the cause, rather than the symptom, of a family dysfunction." (p.35)

parodied the conventional story, the second and denunciatory move is to return incest to the family. Recourse to the stepfather, to the monstrous and deviant nature of the incestuous abuser, to family dysfunction, all these are just disavowals of the irreducible fact that incest is a family matter. For the counter-story, if a family is found then, by definition, there is incest. The effect is to propose the family as an absent presence: *not-there* in that it is out-of-sight while all eyes are fixed on and transfixed by the horror of incest; and *there* in that the horror arises from the "secrets in the family"⁴⁴. The absence and presence are nevertheless the effects of different operations. It is a *denunciation* of incest coupled with its revelation that absents the Family. And it is an *explanation* of incest that presents the Family. The family is used to explain that which will have been revealed, while the revelations of incest are used to accuse the family. In short, an explanation of incest affirms the family, that affirmation being integral to the valued negation of incest. It would seem then that we are not far from the family dysfunction argument in as much as dysfunction is a term which establishes the family as an absent presence. The opposition between the family and incest is thus credited at the same time as a continuity is drawn between the family and incest. If the monstrosity of the abuser is debunked and demythologised, at the same time, the monstrosity of the family is demonstrated by the now-visible and pervasive presence of incest.

⁴⁴ See L. Pincus and C. Dare (1980) Secrets in the Family. In the introduction to a special issue of Feminist Review on "Family Secrets: Child Sexual Abuse", the abuser is analogously formulated as an absent presence: from the 1890s to the contemporary scandals, the focus has been on "the child, with the abuser a shadowy figure in the background": M. McIntosh (1988) "Introduction to an Issue: Family Secrets as Public Drama", Feminist Review, no. 28, pp. 6-15 at p.10.

Incest is however not only continuous with the family; it is also an extended metaphor for the monstrosity of the social. In order to extend the metaphor of incest even further, the counter-story addresses itself not so much to the familial as to the system of kinship. Rather than the accent being on the regulatory principle internal to the family, it addresses the co-ordination *between* families. It is the law of kinship which Ward condenses when she states that patriarchy is a structure "through which the Son becomes the Father by rejecting his Mother and thereby gains unfettered access to the Daughter"⁴⁵. Patriarchy is thus the folding of alliance within filiation, a subordination of kinship internal to genealogy. Ward does however produce a difference in the usual sociological story of the exchange of women⁴⁶.

In the usual story, it is the prohibition of incest which organises the kinship system. Thus, the man comes to disrupt the blissful pre-Oedipal dyad of mother and child. This intervention of the man places the subject under the logic of castration. That logic compels the masculine subject to renounce his incestuous desires and propels him out of the family. In

⁴⁵ E. Ward (1984) op. cit. p. 201.

⁴⁶ Sociology will have taken up the story of exchange by way of Talcott Parsons's structural-functionalist combination of psychoanalysis and anthropology: see T. Parsons (1954) "The Incest Taboo in relation to social structures and the socialization of the Child", British Journal of Sociology, vol. 5 pp. 101-7, and *idem* (1956) "Family Structure and the Socialization of the Child" in T. Parsons and R. Bales, Family: Socialization and Interaction Process. Cf. the feminist tradition which appropriates the anthropology of Levi-Strauss to argue that the paternal function institutes women as objects of exchange amongst men. The locus classicus is G. Rubin (1975) "The Traffic in Women" in R. Raiter (ed) Toward An Anthropology of Women. Cf. E. Cowie (1990) "Woman as Sign" in P. Adams and E. Cowie (eds) The Woman in Question, pp. 117-33.

exchange, he gets *something* in compensation for his loss, some ultimate Good. In this instance, that something is a woman who is not his mother (and secondarily, not his sister)⁴⁷. Ward maintains this principle of exchange but the Good is now Bad⁴⁸. This shift is registered as a shift from prohibition to permission, and correlatively, from the mother as incestuous object to the daughter as incestuous object. For Ward, it is the permission of incest that regulates kinship. Moreover, as with most psychoanalytic stories, Ward ironically tells the story from the son's point of view: the son rejects the mother and becomes the Father of another Family and thereby *inherits the right* to the Daughter. In such a scenario, what drives the son out of the family orbit is not so much the renunciation of his desire for the mother but his identification with the father as abuser of the daughter; the mechanism of expulsion is that the son wants a piece of the action. Ward's displacement of the usual story is to suggest that the logic of castration is not operative, that the Oedipus Complex is not dissolved. In mythological terms, the social contract is not a banding together of brothers in order to prohibit the father's access to the womenfolk of the tribe, but a banding together of

47 Cf. J-J Goux (1992) "The Phallus: Masculine Identity and the "Exchange of Women"", Differences vol.4 no.1 pp. 40-75.

48 It is to be noted here that the reference to some ground in this principle of exchange - whether that ultimate ground is the Good or the Bad, the mother or the daughter - is that which distinguishes the Lacanian account of the incest prohibition from both structural anthropology (Levi-Strauss) and from utilitarian calculations of incest. For Lacan, and paradoxically, what is exchanged is *nothing* - precisely because the incestuous object is impossible. See particularly, J. Lacan (1989) "Kant avec Sade", October, no.51 pp. 55-104. An excellent reading of this essay is S. Žižek (1991) For They Know Not What They Do, pp.229-45. On the impossibility of the incestuous object as daughter, see my discussion in the section below: "Trust Me, I'm Dangerous".

fathers to guarantee access to all the women⁴⁹. That is, the patriarchy has not been overturned by a regime of the brothers. The civility of society is the civility of sexism. End of story.

In any case, this continuity between incest, family and society, formulates the problem of incest as a dogmatic power structure which fascinates the son and in which all things derive from the father. It is thus a causal principle of sociality. But paradoxically, the father operates as both cause *and* effect. The father is also an after-effect of incest, family and society. It is this paradox which can account for the fascination with the father in the discourse on incest. The category is so general as to be vacuous, and so empty as to catch everything *and* nothing.

Romancing the Patriarch

I am accustoming myself to the idea of regarding every sexual act as a process in which four persons are involved. We shall have a lot to discuss about that.

S. Freud, Letter to Fliess

Particular personalities are constructed and privileged in the closed system of intra-familial relations. Within the nuclear family, there is a possible seven points of nexus. In the discourse on incest, only five of the couplets are periodically interrogated. Brother-brother and sister-sister rarely figure. And the remaining same-sex alliances are incestuously unproblematic.

⁴⁹ The myth of the brothers is Freud's foray into anthropology. For an elaboration of this myth in contemporary culture, see J. Flower MacCannell (1991) The Regime of the Brother.

The masculine nexus of father and son is inscribed as an asexual learning experience. The son is presented as aspiring to, imitating, venerating the position of the Father. It is a construction akin to master and disciple, teacher and student, where the subject is masculine identity. In an anthropological variant, the masculine nexus remains asexual but avuncular. Similarly, a feminist discourse affirms the rediscovery and strengthening of the mother-daughter bond - a relation which is a process of gender-identification. In as much as both father and son, mother and daughter, are crucial in the construction of gender identity, they are alliances which remain sexually safe. Yet it is a safety achieved by recourse to an educational paradigm. A common gender, therefore, a pedagogic alliance. In other words, the possibility of a sexuality is occluded by recourse to the non-familial, to the pedagogic.

A counterpoint may be found in other arguments. The redefinition and extension of incest as child sexual abuse through a range of legal and other reformatory programmes has had the effect of rendering pedagogic relations vulnerable. Thus the "abuse of authority and trust" would involve teacher-pupil relations⁵⁰. While not jettisoning the model of the father, the formula of trust and authority extends that model to cover stepfathers and teachers as *if* they were the Father. Ironically, preventive arguments allied with such an extension has also proposed that children be *taught* the dangers of incest⁵¹.

50 This was one effect of the Incest and Related Offences (Scotland) Act 1986. More generally, it characterises the common law translation of the crime of indecent assault into a crime of violence.

51 Handbooks are produced for teaching children how to recognise incest by the paternal figure - whether the reference of that figure is the biological father, the stepfather, the uncle, the grandfather, or the

The counterpoint highlights the similarity across a range of themes. Both point and counterpoint interrogate the pedagogic relationship in order to locate same-sex sexual danger *outside* the family. In so doing, same-gender relations are affirmed within the family space. Thus, a familiar heterosexism is launched by the occlusion of a possible homosexual desire within the family. No doubt, it was the return of this possibility which generated so much anxiety in Cleveland with its image of the the anus bespeaking sodomitic practices that were neither heterosexual nor homosexual but paternal.⁵²

Nevertheless, it is the possibility of cross-sex incestuous alliances that are taken-for-granted: the self-evidence of the discourse on incest proposes that it goes without saying that incest is a matter of father and daughter, or secondarily a matter of son and mother. I shall note both the techniques of this self-evidence and its their correlative reduction of incest to these cross-sex alliances.

teacher. See, for example, Creative Child Press (1985) *It's OK to say No!*. On the educational perspective, more generally, see P. Maher (ed) (1987) *Child Abuse*.

52 Thus, the outrage directed at the paedophile movement in the 1970s in both Britain (Paedophile Information Exchange) and the United States (the Man-Boy Love Association). See D. Tsang (ed) (1981) *The Age Taboo: gay male sexuality, power and consent*. Formulated in terms of consent, gay paedophilia represents perhaps the limit of the formula of incest as "abuse of trust and authority". It is conventionally understood that the outrage at the paedophile movement had its zenith in the 1970s. However, it has rarely been remarked that it haunts more recent moral panics. In the case of *R v P* with which the chapter begins, the figures of incestuous father and the paederast are aligned - the former as simply incest in the family, the other as simply incest outside the family. And finally, in 1986 a vicar is alleged (by police, a conservative MP and Humberside Child Watch) to be both a homosexual and paedophile - but that his so-called child sexual abuse is directed at strangers. The newspaper report makes no mention of the vicar's relations with his three teenage sons. See *The Guardian*, April 10, 1986.

It goes without saying that a feminist and legal rationality has in many instances based itself on empirical and experiential accounts of oppression in everyday life. The discourse on incest is no exception in this respect. One rhetorical marker of the empiricism has been a resort to statistics. Thus, Russell and Howell have noted that 4.5% of American women have been victims of paternal incest, that 12% were victims of incest by other family members, and that, more generally, 43% of American women have been sexually abused by the time they are eighteen years old. MacKinnon cites these statistics, and then concludes that "sexuality itself can no longer be regarded as unimplicated" and that, in particular, male sexuality "centers on aggressive intrusion on those with less power. Such acts are experienced as sexually arousing, as sex itself"⁵³. As for England, during the Cleveland Crisis, the number 121 achieved an iconic function in the debates. The empirical project in these diverse examples places the father-daughter alliance as the paradigmatic problem. Bailey and McCabe resort, in a socio-legal analysis, to the annual statistics to prove that the weight of the prosecution falls upon father-daughter incest, and that adult male incest offenders have a 70% chance of a custodial sentence. Thomas notes that the majority of incest cases that go on appeal against sentence relate to incest between father and daughter, and Mitra's more recent and feminist contribution to the analysis of sentencing in appellate courts comes to much the same statistical

⁵³ C. MacKinnon (1989) Towards a Feminist Theory of the State, at p. 127 citing from D. Russell and N. Howell (1983) "The prevalence of rape in the US revisited", Signs vol. 4 at p. 688.

conclusion⁵⁴. Similarly, Wasoff writes that, in an examination of 52 reported cases, "the relationships in 70% of the cases were father-daughter or stepfather and stepdaughter" and concludes: "[t]his suggests that incest is *really* a question of sexual abuse of a minor girl who cannot give informed consent to sexual activity compounded by an abuse of parental authority"⁵⁵. And finally we can note the rejection of the "hairsplitting" discussion of statistics and the installation of a self-evident fact by MacLeod and Saraga: "whatever the prevalence actually is, it *is* much more common than was ever imagined. The hairsplitting discussion of what is abuse, and what not, obscures the fact that children are constantly exposed to unacceptable sexual attentions from adult men"⁵⁶. In short, through a recourse to statistics, incest will have been self-evidently constituted as adult against child, masculinity against femininity, and father against daughter. Of course, statistics are not the only token of the self-evidence of the discourse on incest. There are also the surveys and interviews which retell the experiences of incest and child sexual abuse. If statistics can be made to say whatever you believe, then what is incontrovertible is the fact of experience. In respect of the father, he might be propelled to commit incest by reason of the social construction of masculinity but in the end - whether it is a

⁵⁴ V. Bailey and S. McCabe (1979) "Reforming the Law of Incest" Crim. L.R. 708-718; D. Thomas (1970) Principles of Sentencing, p. 111; C. Mitra (1987) "Judicial discourse in father-daughter incest appeal cases", International Journal of the Sociology of Law, vol.15 no.2, pp. 121-48.

⁵⁵ F. Wasoff (1980) op. cit. p. 113 (emphasis in original).

⁵⁶ M. MacLeod and E. Saraga (1988) op. cit. pp. 20-1 (emphasis in original). This does not prevent the authors from deploying statistics in the subsequent pages (pp. 20-3), and later noting that an analysis of the findings from the Kinsey research indicates that "in *all* cases, the abuser was a man" and the abused was a girl. And this despite the comment that there was no information on adults and boys in Kinsey.

result of nature or of culture - it is men and particularly fathers who are the perpetrators. Where the statistical and experiential accounts of incest meet is in a pragmatic definition of truth - what is true is the result. Whether that result is indexed in the statistics, or whether it is indexed in the the trauma of the child-daughter disclosed by therapy.

The question is: what remains unpresented in the pragmatic representation of the truth of incest? I approach the question by returning to the formula of seduction and a feminist discourse which would counter that formula. This time the counter-story takes the form of a critique of psychoanalysis and the seduction will have been the paternal seduction⁵⁷.

The feminist critique is a return to the Freudian corpus, and particularly to his famous letter of 21 September 1897, addressed to Fliess. In this letter, Freud broke with his earlier assumption that female hysteria is caused by an actual parental seduction. The reason for the abandonment, according to Freud, was that he had discovered that since "there are no indications of reality in the unconscious" the individual "cannot distinguish between truth and fiction that has been cathected with affect"⁵⁸. Freud's abandonment of the reality of the paternal seduction is an abandonment of his patient's and their reality of

⁵⁷ The feminist critique that I refer to here is primarily sociological and takes as its object the ego-psychological elaboration of psychoanalysis. I take as my background and exemplary texts: J. Herman (1981) op. cit. and E. Ward (1984) op. cit.

⁵⁸ S. Freud (1985) The Complete Letters of Sigmund Freud to Wilhelm Fliess, 1887-1904, p.264. It is interesting to note that Ward quotes this letter differently: "there is no 'indication of reality' in the unconscious, so that it is impossible to distinguish between truth and emotionally charged fiction": E. Ward (1984) op. cit. p. 108.

victimisation at the hands of the father. The feminist critique will have proposed such a Freudian renunciation and will have countered it by their own denial - of Freud. Freud refused to believe in the (referential) reality of the patient discourse. Thus, Daly polemically adverts to the "very fact of [his] misnaming and misdefining her [the Daughter's] reactions"⁵⁹. With this renunciation, a discovery of the widespread existence of father-daughter incest is covered up, even denied. Ward writes: "[i]n theoretical terms, the Father-Daughter rape was irrelevant to the pure form of psychoanalytic ideas, but in practical terms psychoanalysis has denied the very real existence of Father-Daughter rape"⁶⁰. The significance of this denial is that it introduced a change: it produced a myth of incest. The denial of paternal seduction by Freud sets in train a turn away from father-daughter incest to the subsequent modelling of incest as son-mother with its concentration on the wishes of the boy - and this despite the fact that "boys are rarely molested". As MacLeod and Saraga remark, in "Freud's incestuous world, incest is mother-son (the least common); the 'Father' is absent as a character, being present as the punishing superego, the holder of the Law. It is a truly patriarchal imaginary world"⁶¹.

The feminist denunciation of Freud's denial has recently been given further ammunition by the revelations of Masson, a disaffected son of the Freudian archives who, in taking a stand against the father of psychoanalysis, puts himself on the side of reality and the daughter. For

⁵⁹ M. Daly (1979) Gyn/Ecology, p. 267.

⁶⁰ E. Ward (1984) op. cit. p. 110

⁶¹ M. Macleod and E. Saraga (1988) op. cit. p. 29, and more generally on the Freudian legacy, see pp. 28-31.

Masson, Freud's reduction of the seduction theory in favour of fantasy was a disavowal of the patient's empirical reality. Moreover, it is a disavowal which is continuous and of a piece with a generalised reluctance on the part of a generalised society to confront the very idea of sexual violence in the family⁶². In short, the denial of incest is both individual (Freud the Freudian) and social (patriarchal - for after all, we should not berate Freud for being a child of his time). Psychoanalysis will then be reinstated only in so far as it admits to the real rather than the mythical fact of incest. Not surprisingly, Anna Freud will have a place: "Far from existing as a phantasy, incest is thus also a fact, more widespread among the population in certain periods than in others. Where the chances of harming a child's normal development growth are concerned, it ranks higher than abandonment, neglect physical maltreatment or any other form of abuse. It would be a fatal mistake to underestimate either the importance or the frequency of its actual occurrence"⁶³.

The important thing in the counter-story is that denial is formulated as change: father-daughter incest is eclipsed by son-mother incest. It should thus come as no surprise if, in order to produce a change of their

⁶² J.M. Masson (1984) The Assault on Truth: Freud's Suppression of the Seduction Theory. For a similar account, see also A. Miller (1984) Thou Shalt Not Be Aware: Society's Betrayal of the Child. Masson's revelations provoked outrage - at least in the United States - whereas Miller has often functioned as the "acceptable face" of psychoanalytic-psychological feminism. On the furore, see J. Malcolm (1984) In The Freud Archives.

⁶³ A. Freud (1981) "A Psychoanalyst's View of Sexual Abuse by Parents", in P. Mrazek and C. Kempe, Sexually Abused Children and Their Families, p. 34. See also D. Winnicott (1961) Home Is Where We Start From, commenting at p. 109: the seduction of children brings them "to a real, instead of an imaginary, sexual life, and spoiled the child's perquisite: unlimited play".

own, the feminist counter-story denies the Freudian denial. The change induced will have been an affirmative revelation of the reality of the daughter's patient discourse. Freud's patients are telling the truth - the only phantasy was in the head of Freud and the mind-set of society. In its impatience, a feminist discourse on incest inverts the hierarchy of fantasy and reality; and feminism quickly rushes to supplement this revelation by its own work, its own empirical material. Thus, Ward documents interviews with adult women who were child-victims of their fathers; and Herman interviews the daughters of incest and associated legal and welfare professionals.

Campbell makes the criticism that "so much criminology as well as clinical practice has metamorphosed the fact of abuse into a fantasy of desire"⁶⁴. Forward notes the metamorphosis of fantasy into abuse by way of a denial of Freud: "[i]n essence, because Freud couldn't believe so much incest was going on, he assumed it wasn't. The pendulum is now swinging the other way. Therapists are now beginning to realize that, unless there is strong evidence to the contrary, all incest reports should be considered valid"⁶⁵. In this pragmatic approach to the truth, the fact of the daughter's *reporting* is taken as symptomatic of a prior trauma. If the daughter says it happened then it happened because the reporting is understood as a result of a trauma. In doing so, the opposition between phantasy and reality is maintained: either incest is reality or phantasy. Paradoxically, the affirmation of the literal reality of seduction is, at the same time, a denial of the fact that the patient is

⁶⁴ B. Campbell (1988) op. cit. p. 209.

⁶⁵ S. Forward with C. Buck (1981) Betrayal of Innocence: Incest and Its Devastation, p. 154.

reporting the trauma. It is this double bind which Freud attempted to hold onto when he abandoned the existence of a literal seduction. Freud had attempted to deal with the phantasm of seduction - not as a myth or stereotype, not as a referential language, but as that which speaks of nothing but itself⁶⁶. Which is to say, the trauma of the patient. It is this trauma, this phantasmatic *reality* of the patient, that is lost to the counter-story. In this strict sense, the feminist denial of Freud is necessary. In reading the seduction as myth, the feminist critique can go on to speak of something else. The revelation of the daughter's reality becomes the revelation of the father's abuse. The disclosure of the daughter's reality changes the focus of psychoanalysis from the wishes of the son in the mother-son relation, to the behaviours of the father in the father-daughter relation.

⁶⁶ I am drawing here on another tradition of feminist thought. There, the description of the patient's discourse as phantasmatic is not a denial of reality, but rather an insistence on the irreducible necessity for the real to be interpreted in order to take on significance. The norm is not one of correspondence between myth and reality, but of a coherence and incoherence within a psychical reality. The phantasm, with all its slips and aporias, is the scene of the subject's captivation. The locus classicus for this interpretation is J. Laplanche and J.B. Pontalis (1986, orig. 1964) "Fantasy and the Origins of Sexuality" in V. Burgin et.al.(eds) Formations of Fantasy, pp. 5-34. Therein, they remark: "'A father seduces a daughter' might perhaps be the summarised version of the seduction fantasy. The indication here of the primary process is not the absence of organisation, as is sometimes suggested, but the peculiar character of the structure, in that it is a scenario with multiple entries, in which nothing shows whether the subject will be immediately located as *daughter*; it can be fixed as *father*, or even in the term *seduces*" (pp. 22-3, italics in original). For a specifically feminist appropriation of this essay, see E. Cowie (1990) "Fantasia" in P. Adams and E. Cowie (eds) The Woman In Question, pp. 149-96. More generally, on feminism and psychoanalysis, see J. Gallop (1982) The Daughter's Seduction. On the psychical reality of the criminal legal institution, see P. Rush (forthcoming) "A Child Is Being Beaten: the indecent image of law", in S. McVeigh, P. Rush and A. Young (eds) Criminal Legal Practices.

Just as the affirmative revelation of the patient's discourse relocates the daughter in a different landscape, so it also promotes a new place for paternity. For the counter-story, the paternal metaphor is not so much a precondition of reference, an assignment of positions, as a literal site of social language. On this site, we can glimpse the birth of a new man who rises from the ashes of the critique. The function of this phoenix will have been to re-assert the paternal metaphor. Herman closes her book with a programme for a "very different image of the father": "fathers who have learned to understand the needs of children, who can distinguish between sexuality and affection, and who recognise the appropriate limits of parental love ... As long as fathers retain their authoritarian role, they cannot take part in the tasks or the rewards of parenthood. They can never know what it means to share a work of love on the basis of equality, or what it means to nurture the life of a new generation. When men no longer rule their families, they may learn for the first time what it means to belong to one"⁶⁷. Similarly, the family line is inherited in the sounding of the battle by Ward, who announces that "we are naming the hitherto unnameable".⁶⁸

What is at stake is the unnameable. But it cannot be expressed as *such*. Such a possibility is reintroduced by Ward's temporalisation of the unnameable: it is *hitherto*. It is this lamination which institutes a difference from Lyotard's clarion call of postmodernism. What is instituted by Ward's critique is a recuperation of the lost reality - in this case, the reality of the man who belongs to the family. Against such a

⁶⁷ J. Herman (1981) op. cit. p. 218.

⁶⁸ E. Ward (1984) op.cit. p. 213.

nostalgic programme, Lyotard's demand is unconditional. For Lyotard, the naming of the unnameable is "that which puts forward the unrepresentable in presentation itself; that which denies itself the solace of good forms, the consensus of a taste which would make it possible to share collectively the nostalgia for the unattainable; that which searches for new presentations, not in order to enjoy them but in order to impart a stronger sense of the unrepresentable."⁶⁹ Of course, that which is intrinsic to representation and yet ruins representation has many names. It is the sublime, it is rhetoric, it is the ethical, it is the subject that dies in law. Paradoxically, the names of the unnameable proliferate - and necessarily so. It is "what Freud calls sexual difference. One can, one must (one cannot not) give it a thousand names: the sexual castration of the mother, incest taboo, killing of the father, the father as name, debt, law, paralyzing stupor, seduction, and, perhaps the most beautiful: exogamy, if one redirects its meaning toward an unstoppable and uneven pairing between man and woman, but first between child and adult"⁷⁰. Lyotard here insists on an irreducible and asymmetrical coupling in the re-presentation of incest. Ward, on the other hand, evokes an equivalence between child and adult, between masculine and feminine. In this sense, a feminist pragmatic rationality is thoroughly at home with a genealogy instituted by the dogmatic paternal metaphor, with the name of the Father, with the Law. Just as Herman asks for a "very different image of the father", so Ward proposed naming the victimage of the daughter issues in a discourse on masculinity: "We, the

⁶⁹ J-F. Lyotard (1984) The Postmodern Condition, p. 81. See also the much neglected essay, (1978) "One Of the Things At Stake in Women's Struggles", SubStance no. 20 pp.9-17.

⁷⁰ J-F. Lyotard (1990) Heidegger and "the jews", p.19.

Mothers and Daughters, are seeing now through our own eyes. We do not forgive the Fathers ... Whatever the reasons for men's hatred of women, we ourselves are changing the structure of the battle. We are resisting; we are strategically withdrawing; we are naming the hitherto unnameable. In doing these things *for our own sakes*, the corollary is that the Fathers have access to space in which to look at themselves: to hear what they have done, to see what they have done"⁷¹. From the Son to the Father to the new man who is a daddy, there is an endless discourse on and of the masculine. In the counter-story, there is only one name - the father, the father, the father of masculinity. We must hear what the man has done, will do, and does. The discourse on incest must repeat the crime of masculinity which it announces.

If the problem of incest has been the self-evidence of masculinity, then the argument so far has been that such self-evidence must be installed within the discourse on incest. The tokens of that installation upon which I have remarked have been the resort to statistics and the translation of phantasy into fact in a pragmatic definition of truth. Moreover, the implication of the argument has been that to name the self-evidence as a "construction" is itself insufficient in as much as it simply reinstalls a denial. Denial simpliciter, as we have seen, is the motor of change installed by a discourse of revelation. That discourse is a narrativisation of myth. It collapses levels of intelligibility by attempting to account for structural relations (the myth of incest) in terms applicable to particular events (an act of incest). Structures - such as the patriarchal - are explained through events that enact them. Myth thus

⁷¹ E. Ward (1984) op. cit. p. 213, italics in original.

fixates and totalizes through a narrative of events, and it seeks a point of undivided origin in a first event which begins a story. Closure is achieved when particularities are reduced to itinerant moments between a beginning and an end, and the original event (the father's abuse of the daughter) is either redeemed or transcended. As such, the claim that "it is a particular construction of masculinity that enables men to sexually abuse children"⁷² adds nothing to the fixation of the masculine. The discourse on incest insistently returns that which is unnameable to a repetition of the paternal metaphor. In the remainder of the chapter, the concern is to describe the *staging* of this return in the formula of incest as an abuse of authority and trust.

Trust Me, I'm Dangerous

The official debate forms a family of themes that constitute incest as a space of mutually exclusive arguments. The self-evidence of the discourse on incest is tied to the assumption that nothing can be said outside these arguments. It is conventional to identify three strands: incest as a problem of genetics, incest as a problem of property, and incest as a problem of authority. The genetic argument is a concern with incest as an inmixing and corruption of the blood lines - whether by virtue of biology or by convention (legally designated relations of marriage). Whereas the genetic focuses on the effects of incest, the property argument focuses on the effects of its prohibition. The prohibition of incest is thus formulated as that which institutes the movement from consanguinity to affinity, a movement which has as its

⁷² Once again, it is M. MacLeod and E. Saraga which provide the most concise formulations of the counter-story, see op. cit. p.43.

sine qua non the exchange of women by men. The authority argument once again returns the focus to the experience of incest but this time sets each particular act of incest as an instance of a generalised power relationship - simultaneously, an instance of the power relation between the sexes and between the generations: masculine and feminine, adult and child. In all three arguments it is the relation between incest and its prohibition which is at stake. Moreover, if they are mutually exclusive arguments, this has not prevented them from sitting side by side in the same texts. Rather, the arguments exist within and between a range of texts. Nevertheless, at the outset it should be noted that the genetic argument had its heyday in the late nineteenth century discourse of eugenics, and remains today in the statute books⁷³. In the more recent debates, the genetic argument usually functions as a prop from which the other two strands of the debate can depart and thereby define themselves⁷⁴. My concern is not to choose one of the three alternatives, nor to square the triangle and offer a fourth. Rather, since it is the problem of authority that has gained ascendancy in the legal and cultural debates, I essay the inscription of its limits.

The authority argument stages incest in terms of three main characters - father, daddy and daughter. What will have to be noted is the way in which these three characters are placed in relation to each other - that is, to read them as *tactics (topoi)* in the argument.

⁷³ See the Marriage Act 1949, Schedule 1, as amended; and especially the Marriage (Prohibited Degree of Relationship) Act 1986, section 1 and Schedule 1.

⁷⁴ For the property argument, see G. Rubin (1975) *op.cit.*. For a disruption and redirection of the property argument, see the essays "Women on the Market" and "Commodities Among Themselves" in L. Irigaray (1985) This Sex Which Is Not One, pp.170-91 and 192-7.

Father and daddy are two sides of the paternal coin. The father is constructed as the representative of authority. He is aloof, serious, stern, an object of respect. His archetype is the patriarch. A unitary and self-sufficient figure, he is the cold and distant overlord of his family who, in appropriately Hegelian terms, is distant because his gaze is directed towards the wider community. Because he looks outward beyond the family, he overlooks his role within it. This is the ethical problem of incest. From the child's point of view, the father is lost. He is strange because he is distanced (unconcerned with the child) and he is familiar because he oversteps his relationship with the child. Father is all-all-too absent and all-too-present. The familiar violence of the father towards the daughter is thus an ethical estrangement from the daughter.

The characters of daddy and daughter will have been placed primarily around this lost figure of the father. In the face of the violence of the father, daddy represents the possibility of a recuperated masculinity - still under the yoke of the image of father, but with a little more effort and a lot of help from friends he will leave the chains of an archaic masculinity behind. He thus presents the possibility of what Mason, a Scottish legal reformist, has called a "normal paternal affection"⁷⁵. It is also the *telos* of the Department of Health's guidelines on the protection of the child: "Defining what is unacceptable in terms of parental behaviour presupposes a common understanding of what is normal in terms of parent-child interaction."⁷⁶ Daddy cares. Rather than

⁷⁵ J. Mason *op. cit.* p. 304; for a more complex reinterpretation of paternal affection, see M. de Montaigne (1958) *Essays*, pp. 137-158.

⁷⁶ Department of Health (1988) Protecting Children: A Guide for Social Workers Undertaking A Comprehensive Assessment, p. 7.

directing his gaze towards the outside community, he participates in the life of the family. Rather than a unitary and fixed position, daddy is flexible. From his partner's point of view, he takes up a range of roles - helps out with the childcare, does the shopping, and so on. He is sober of mind and sober of habit but not sombre. From the child's point of view, he is approachable, friendly, sympathetic, playful and interested.

For the incest debates, the daughter, like the father for the child, is an image of loss. She is a victim - whether because her body has been abused or because her voice has been disqualified⁷⁷. Faced with the overwhelming evidence, it is tempting to make a stand with the daughter, to constitute oneself on the side of the daughter. In the discourse on incest it is a discourse of the rights of the child that has been activated to recover the daughter from her victimage. The age of the victim is the age of the daughter and her rights.

It is possible to note the effects of the language of rights in the staging of the photographs reproduced here as figures 1-3. The photographs circulated in March 1986, immediately following the scandals resulting from the deaths of Tyra Henry, Heidi Kosedá and Jasmine Beckford. If only by virtue of their timing, all three photographs are linked to the issue of child abuse. This link is also made by the context of their reproduction. The photographs in figures 2 and 3 were printed as illustrations to an article in Marxism Today called "Just Another Child Abuse?", while the photograph in figure 1 was printed as

⁷⁷ In this respect, Smart's championing of the lost voice of the child is exemplary. See the essay "A Note on Child Sexual Abuse", in her (1989) Feminism and the Power of Law, op. cit.

an illustration to an article in the Guardian with the title "The wicked stepfather"⁷⁸. Further, the source that supplied the photographs was the National Society for the Prevention of Cruelty to Children (NSPCC).

In the article ostensibly about "stepfathers or substitute fathers" by Neustatter, it is strange to say the least to include a photograph of a child - and even further, to give over almost a half of the article space to that photograph of the child (figure 1). But some clarity is to be had when the text remarks that "the significance of the relationship between the man and the child appears to have passed unremarked". The photograph is a photograph of the relationship between the man and the child - a child here styled as feminine. That relationship is one of abuse - *both* sexual *and* physical. And the effect of that abuse is the loss of the daughter. Head bowed, face hidden, shoulders slumped, wrists crossed in front, and feet turned in, the child is withdrawn -

⁷⁸ Respectively, E. Driver (1986) "Just another Child Abuse?", Marxism Today, March pp. 20-22; and A. Neustatter (1986) "The wicked stepfather", Guardian, June 10, p.8. See further, E. Driver's contributions to E. Driver and A. Droisen (1989) Child Sexual Abuse, esp. chaps. 1 and 6.



FIGURE 1.



FIGURE 2



FIGURE 3

turned in on herself. The child is not just lost to the abusive father but also to the reader. Or more correctly, the reader and the father are positioned as one and the same. The provocation of the scene is in its address. It is addressed to men, to the father, and particularly to what the article at one point calls "the ersatz father". And what men are directed to see in the photograph is themselves - man as sexual abuser. The body of the child is constituted by the gaze of the reader but that gaze is demanded by the photographed. In keeping an eye out for the tell-tale signs of the abused child, it is not the child that is recovered but the masculine abuser that is constituted. The photograph is thus of a piece with the text in as much as the text relies on the self-evidence of reportage to advocate the self-examination of stepfathers, ably supported of course by Stepfamily - the National Stepfamily Association. In the photograph the image of the child is a substitute for the father, but this is not the real father but the father represented in and by the image of the child. As fate would have it, the article speaks of "stepfathers or substitute fathers". In semiotic terms, both daughter and father are metaphors (the operation of substitution) and, as Kristeva has noted, the operation of metaphor is sacrificial.⁷⁹ The daughter is sacrificed to the demand of representation, a demand to represent the father. But the demand to represent the father is never satisfied. All that is given is a simulation, a substitute, a sacrificial surrogate - the stepfather.

⁷⁹ J. Kristeva (1982) Powers of Horror, p. 95. In the context of my earlier description of a discourse of revelation, I remarked that revelation is linked to change by the mechanism of "denial". It is this structure of revelation-change that is sacrificial - and is implicitly acknowledged as such when disclosure and revelation are described as a process of *catharsis*, for example, by M. MacLeod and E. Saraga (1988) *op.cit.* at p. 49. It is however a sacrifice which is ungrounded, always at a loss. In sum, the sacrificial structure is superficial - and that sacrifice of the superficial, the contingent, the arbitrary, is the way to get things done.

Both father and daughter are victims of the demand for representation. And if the victim is privileged by virtue its status as victim, then how are we to choose between the father and the daughter? The language of rights demands that we choose the daughter. While the language of a return to the rights of the child is implicitly used in Neustatter's article, it is explicitly used in the essay by Driver which accompanies figures 2 and 3. In this article, Neustatter's photograph is reduced to the size of a matchbox (figure 3) and replaced by a grotesque parody of the classic family portrait of the child (figure 2). The difference between the two photographs may be described as the difference between child abuse and child sexual abuse: child abuse is symbolised in physical signs such as the bruised eyes and swollen lips; while child sexual abuse is "hidden" and thus must be brought out by the posture of the body. Given that Driver is ostensibly addressing the problem of child abuse, then it is possible to understand the privileging of figure 2 as an illustration for her article. Figure 2 relies on the materiality of the stigmata, whereas figure 3 relies on the body posture, the ambiguity of gesture⁸⁰. But the privilege granted the cuts and bruises by the representation cannot be maintained. Whereas the face is hidden in figures 1 and 3, the distinction of figure 2 is that the reader is confronted by the face of the child. The open face of the child, staring directly, redirects the meaning of the representation. It is a gesture that demands - without explanation, as truth, it speaks. It opposes the absence of representation without representating anything other than the demand. Nothing to be revealed but it demands nevertheless....

80 In these terms, the image of the child in figure 1 is structurally akin to the image of the anus that was so prominent in the Cleveland Affair.

... It is a demand that is never met in the language of rights. As with figure 1, the photograph denotes the child but connotes the masculine abuser. The child is lost, as the affirmation of the child is overtaken by the denunciation of masculinity. The symbolic dimensions of masculinity collapse into the imaginary of the feminine child. The child is here only a reflecting surface, a surface which is constituted as a reflection of the father. As fate would have it, the NSPCC photographs are always simulations: the accompanying formula being "We have used a model to protect the child's identity". The repeated displacement of the child can also be read in the words of the essay, and specifically in its advocacy of the rights of the child. It is the formula of childrights which allows the categories of child abuse and child sexual abuse to communicate with each other. But the text also stages another dialogue: in many respects, the essay constitutes a dialogue and an attempt at rapprochement between socialism (the Left) and feminism. And again, what allows feminism and socialism to get together is the figure of the child as victim. It is not so much that they are listening to the child (one cannot not listen), but that the response is for socialism and feminism to talk to each other. Or, for husband and wife to talk to each other - Neustatter quotes a stepfather confronted with a stepdaughter: he is "lucky enough to be the sort of person who is used to discussing problems and because my wife talked everything through with me all the time". In this sense, the demand for the rights of the child is an ethical failure. To choose between victims - between the father and the daughter - is to institute an asymmetrical relation between the demands of the victim. In Lacanian terms, the demand of the child is always-already perverted by the desire of socialism and feminism - or, the

desire of husband and wife, father and mother, adult and child, masculine and feminine - to get together. Of course, we cannot but choose to do so in the face of the demand from the child.

After all, it is the demand of the child's face which fascinates me. This is the power of the victim. It is a demand that resists all revelation, resists all change. If it is a question of what is to be done about incest, then the revelation of the child as victim transfixes rather than changes. It offers up the child as the catharsis of masculinity. The revelation of the child is at once a sacrifice of the child and it is this double bind which fascinates those who behold the daughter as victim: moving neither forward nor backward, the masculinity of the photographs and the language of rights is not stasis but *hypostasis*. The daughter is the creation of the envious desire that the father feels for something he is forbidden to be. This is after all love: giving what you haven't got to someone who doesn't want it anyway.⁸¹ Incest as the reality of love's phantasm? A recent contribution to the annals of incest asks to be *read before* it is legislated:

"A step-father speaks out about love

WOODY AND ME

First Person

So Woody Allen is in trouble for his behaviour with the adopted daughter of his common-law wife. It has been said if he had wanted sex, surely he should have looked further than his lover's daughter. But perhaps he wasn't even looking for sex. Familiarity can breed content. You needn't have a thought of straying until something inside is stirred that arouses the possibility - perhaps through sustained contact with someone close. Surely it is through proximity with someone, anyone, that feelings are aroused.

⁸¹ This is Lacan's formula of love as described by R. Braidotti (1987) "Envy: or With Your Brains and My Looks" in A. Jardine and P. Smith (eds) Men in Feminism, pp. 233-41 at 241.

One is not necessarily driven to seek extramarital sex. Rather, love can grow, unwittingly and unexpectedly. The *feeling* is not something you can control, only what you decide to do about it.

As a youthful 40-year-old who unexpectedly found himself in love with his 17-year-old stepdaughter, I understand something of Woody Allen's plight.

I met her when she was seven. I was 30, her mother 28 - the latest of my girlfriends, the first with children. She was a recent divorcee and, as a lone mother with problems, she came under my protective wing. We grew together, began to live together and eventually married - me taking on the unexpected role of father to her two small children (there is a younger boy). I have adjusted to the role as well as I can. Thankfully the children accepted me without difficulty and soon honoured me with the name Daddy. In the years since, we have lived, loved, shopped, travelled moved, argued and made-up again as a family.

My step-daughter's early teenage years were a little testing - doubtless as she fought with her changing body, and us. But she was growing taller, slimmer and more feminine, and in time - I don't know respectively how or when - I became aware that I loved her, terribly, passionately, not as a parent but as one human being for another.

I found I loved to be with her, to talk to her - as a close friend, a confidant. We talk of pop music, clothes, sex, boyfriends (I conceal my jealousy). I realise I now relate to her like a partner - and treat her like one, like a young girlfriend. And, quite frankly, I often want to take her in my arms, kiss her and make love to her. And it all seems unexpectedly natural, definitely not like desiring a daughter, just a vivacious, attractive young woman.

Believe me, the realisation has troubled me deeply. For I am no pederast (she is hardly a child). And I am not sure I would feel this way if she were my daughter, known from birth. It is the fact that we are not related that rationally okays the relationship - as Woody Allen said of his own. But there is nothing rational about this. Just emotional.

Unlike Woody Allen, I do not pursue the physical affair for which a part of me yearns. I hope my attentions are interpreted as fatherly love. My deeper feelings I keep within. You can criticise me for having them but, believe me, I didn't seek them; I just realised I had them when I unexpectedly found I ached for this girl. She was no longer simply my step-daughter; she had become an attractive member of the opposite sex.

Some may argue that I should be looking elsewhere for satisfaction. My point is that I, and perhaps Woody Allen, was *not* looking for satisfaction. I have an excellent sexual relationship with my wife. I just happen to be in love with my step-daughter. I can't help it and I am not sure how to deal with it. For the moment, I just have to live quietly with this, keep it within and see if it goes away in time - absorbed back into the sort of fatherly feelings of which our society approves."⁸²

To Kiss: An Intransitive Verb

⁸² Anonymous (1992) The Guardian, 26 August, p.29 [The Guardian Women's Page]

To touch is the beginning of every act of possession, of every attempt to make use of a person or thing.⁸³

Women are unimaginable without the violation and validation of the male touch?⁸⁴

Authority is a question of power as the use and abuse of domination. Ennew is concise and goes straight to the point in the first lines of her introduction to The Sexual Exploitation of Children: "This book has more to say about power than about sex. It is therefore also about the abuse of power and the powerlessness of particular categories of person. In general the powerless group I examine consists of children"⁸⁵. Incest is addressed in behavioural terms. The experience of incest is the experience of a set of typical behaviours. Any particular act will thus obtain its meaning in a narrative that grinds inexorably from beginning to end. Of course, there will be some ambivalence as to where incest begins and where it ends, but rarely is the narrative framing in question. Wasoff provides an exemplary performance: "[u]sually (and these are generalisations), contact is initially non-violent and begins with relatively low levels of sexual contact progressing over time to a degree of sexual intimacy, which may or may not be full sexual intercourse"⁸⁶. It is within this narrativisation of acts that sexuality is doomed to expression, that incest is submitted to meaning, that the experience of incest is staged as domination of the daughter by the father.

⁸³ S. Freud (1938) Totem and Taboo, p.43

⁸⁴ C. MacKinnon (1987) Feminism Unmodified, p. 219

⁸⁵ J. Ennew (1986) The Sexual Exploitation of Children, p. 1.

⁸⁶ F. Wasoff (1980) op. cit. p. 115. For statements to this effect in the legal arena of criminal sentencing, see C. Mitra (1987) op. cit.

Two avenues have become familiar. One is to separate out violence from sexuality and thereby assign the incestuous to the side of violence. This path is most frequently taken by those who place the accent on adult-child relations - relations which by virtue of age are categorically asymmetrical. It is here that we read of the "innocence" of the child and the betrayal of the trust which the child puts in the parent. This avenue tends to exclude the sexual from or at the very least subordinate the sexual to the violent. A variant is that which resurrects the sexual under the aegis of an appeal to autonomy and consent, and thereby subordinates the violence to the sexual. The primary significance of incest on this variation is that it combines the sexual with the violent: thus opening up the possibility of a sexual relation with a child which is not violent and therefore not child sexual abuse. The second avenue is that which refuses the opposition between violence and sexuality. Instead, radical feminism will have equated them in a grammar of masculinity. To parody MacKinnon, masculinity is male sexuality is violence is power is domination. In other words, the radical feminist position acknowledges that child sexual abuse is narrativised but then denounces that narrativisation as sexist, "discriminatory". In the final section of this chapter, and as a conclusion, I would like to take my chance and chart a way between these two avenues. That will have involved not so much a denial of the narrative staging of incestuous masculinity, but an affirmation of that which is intrinsic to the narrative but which ruins it.

The character is daddy and the act is a kiss. As suggested above, Daddy is the image of a masculinity recovered from the loss of the father represented in the discourse on incest. He is caring, paternal and

affectionate and *interested*. Having constituted himself on the side of the daughter, it is perhaps no surprise that it is fraught with ambivalence. It is the ambivalence of touch. More specifically, we may call it the ambivalence of a kiss. Kiss Daddy Goodnight is the title of a book by Armstrong, which became a pioneer in the feminist genre of the daughter-speaking-out. While Armstrong's title indicates the ambivalence, Forward will have registered the same by placing scare quotes around the proposed alternative to the incestuous father: 'daddy'.⁸⁷

The ambivalence resides not in the physical act of a factual kiss but in what the kiss might indicate - the beginning of "sexual contact", leading on to "sexual intimacy". In short, the ambivalence allows the narrativisation of the incestuous father to get started. And in doing so, it throws daddy into doubt, puts him under suspicion. It suggests, although he might not know it, that an incestuous father might be lurking inside him. The kiss is thus the return of that which had been forgotten in the father - not simply that the father was absent, but that he was an *all-too-present* absence. It is at this point that the discourse on incest joins up with social ontology as a technology of the masculine self. Daddy must remain vigilant, not so much against the father as against himself - or more correctly, against the father in himself. The image of daddy is thus a kind of manual for masculine self-examination. Such a technology may be registered in the increasingly familiar image of the "puzzled parent who dare not cuddle his child"⁸⁸. As Campbell reports, "[i]n the wake of

⁸⁷ S. Forward with C. Buck (1981) op.cit.

⁸⁸ M. MacLeod and E. Saraga (1988) op. cit. p. 7, see also pp. 20 and 22. They are here noting a trend in the debate but are not endorsing it.

the Cleveland crisis many parents, particularly fathers, seem confused about their boundaries: 'can I cuddle my three-year-old?' they're asking"⁸⁹. Despite what the song says, a kiss is not just a kiss. The proposed solution has been to agree a set of rules which will mark out the territories of the participants and particularly the father⁹⁰. In short, the phantasm summarised as "kiss daddy goodnight" evokes an ambivalence in the order of reference - and an ambivalence that is necessary to bind the masculine subject into an interminable self-examination.

But the endlessness of the self-examination does not arise from the act or the individual, but from the use to which they are put, their possession by the incest prohibition. The ambivalence of contact registers the communal bond of the incest prohibition.

What is disavowed in the prohibition is contact with the daughter. As taboo, she is placed out of reach. The person who thus has any contact with the daughter has broken the taboo. He has placed himself on the side of the daughter, he has placed himself outside of the communal bond. As such, the contact which is forbidden is not simply

89 B. Campbell (1988) op. cit. p. 12

90 Department of Health (1988) op. cit. which addresses itself to mapping the central traits of good and bad parenting and the abuse of children. In the context of my remarks here, the rhetorical question with which the essay on child sexual abuse ends in C. Smart (1989) op. cit. is an admission of failure on Smart's part: "it is necessary to ask who has the resources or inclination to tackle the problem of masculine sexuality?" The remark is of a piece with her hands-off approach to the child in as much as she suggests children will always be dealt with on adult terms and thus we must do nothing but listen. In both instances, Smart is unable to specify the rationality that binds revelation to intervention.

the contact between daddy and daughter, but also the contact between incestuous abuser and the rest of the community. Kissing is "the point of contact with what is normal"⁹¹. Such contact creates the dangerous possibility that the community might be affected by the person who breaks the taboo. What is dangerous is the possibility of contagion of the community which is evoked by the breach of the taboo, a breach that is purely conventional. As Freud notes, it is not necessary to have actually broken the taboo to become a carrier of the prohibition⁹². All that is necessary is an arbitrary mark of desire - call it the "stock-in-trade" of the incestuous father and the paederast, call it the kiss of the accused, call it the face of the daughter. There are numerous names for that conventional trait which the law of the community offers up in the

91 S. Freud (1977) "Three Essays on the Theory of Sexuality" in On Sexuality, p. 64. The remark is made in the context of describing the perversions. More specifically, he notes that "the use of the mouth as a sexual organ is regarded as a perversion if the lips (or tongue) of one person are brought into contact with the genitals of another, but not if the mucous membranes of the lips of both of them come together. This exception is the point of contact with what is normal." (pp. 63-4) The distinction is however "purely conventional". As such, the disgust at the former can become transferred onto the latter. In short, kissing has an ambivalent affect.

92 S. Freud (1938) op.cit., p.42: "a person may become permanently or temporarily taboo without having violated any taboos for the simple reason that he is in a condition which has the property of inciting the forbidden desires of others and of awakening the ambivalent conflict in them." In this context, it is worth remarking that the order of taboo is specified as operating in the register of touch. In the second chapter of Totem and Taboo, on which I am drawing here, taboos are structured as an "ambivalence of emotions": disavowal and affirmation, horror and lyricism. Such ambivalence can be associated with the "divided attitude" which characterises fetishism. The distinction is however that whereas the ambivalence of fetishism is a function of vision, of revelation, the ambivalence of taboo is a function of touching, of contact. Freud has been frequently criticised for the oculo-centrism of his theory, but here I note the disruption of the ocular privilege: taboo is not so much a prohibition of seeing, but a prohibition of touching and being touched. In fact, in his "Three Essays" Freud reverses the priority and remarks that seeing is "an activity that is ultimately derived from touching", op.cit. p. 69.

service of its ambivalent relation to the outsider. The anxiety of daddy is no more and no less than the displacement of the community's ambivalence. Daddy feels as *if* he is guilty⁹³.

The law of incest is that the prohibition promises what it bans. It substitutes the contingency of a kiss with a narrative of community, the particularity of a touch (*con-tingere*) with the structure of contagion. It is this sacrifice which the law institutes in order to forget. The chance of this chapter has been to read in the kiss of the face, the intransigence of that which the law has forgotten, the aporia in which another justice bleeds. But perhaps as critics we judge ourselves too wise, too cocksure, to read that impossible and unconditional ethical demand.

⁹³ J. Derrida (1976) *Of Grammatology*, pp. 255-268 in which he remarks Rousseau's confession that "I felt as if I had been guilty of incest".

Chapter Three

THE OBSCENITY OF SOCIO-LEGAL REASON

off-stage and masculine

*Man fucks woman;
subject verb object.*

*in reading as in writing
one is always already a whore.¹*

¹ Respectively, C. MacKinnon (1989) Toward A Feminist Theory of the State, p. 124; and T. Modleski (1991) Feminism Without Women, p. 42.

Living off the obscene

When it is a question of reading, the only place to start is with the itinerary of a letter. Like the poison-pen letter - a letter "which conveys a message which is indecent or grossly offensive"² - the itinerary of the letter K will have produced anxiety and distress.

In chapter 3 of The Trial, it is written that K is expecting to be called before the law, yet he receives no further summons³. In response to this demand that never comes, he returns to the offices of the examining magistrate. A woman is in the room but he barely notices her. (K is later told that he has met her before and that she is the wife of the Attendant to the Law Courts). She tells him that there is no sitting today.⁴ Incredulous, he doesn't believe her but the woman opens the door to "the adjoining room" and K sees for himself that indeed the law is absent. The office was "really empty and its emptiness looked even more sordid than the previous Sunday" (T 58). Of course we have

2 See section 1(1) of the Malicious Communications Act 1988, an "Act to make provision for the punishment of persons who send or deliver letters or other articles for the purpose of causing distress or anxiety". Among the range of other statutes, see also the Children and Young Persons (Harmful Publications) Act 1955 [on "the dissemination of certain pictorial publications"], and the Protection of Children Act 1978 [on the distribution, showing and advertisement of indecent photographs of children].

3 F. Kafka (1953) The Trial. All further references to this text will be given in the main text, preceded by the initial T.

4 The woman here is one of many such "guardians of the law" in The Trial, of which perhaps the most famous is the doorkeeper in the story "Before The Law". One version of this story is a later part of The Trial, another is collected as a short story in F. Kafka (1983) "At the door of the law", in Stories 1904-1924, pp. 194-5.

become accustomed to living with this insight. As Girard formulates it, "the absence of the law is in fact identical with the law run wild and ... this identity constitutes the chief burden of mankind".⁵ Deprived of its insignia, its symbols, its rituals, its personages - in short, deprived of its life - the law is at one and the same time a sordid administrative reason. The deflation of law is paradoxically the inflation of law. Our burden is to be confronted by a legal institution that is dead and, by virtue of that very fact, deadly - without limit, deterritorialised, unbounded.⁶ It is a question of the places of law: for Girard, the law is all over the place. But perhaps such a reading is too quick, in as much as it is haunted by nostalgia for the law that has been lost. The emptiness is styled as something lacking, a presence that abstains from showing itself. However, in Kafka's tale, a text of sorts lives on in the place of the law.

K asks the woman - "not out of any particular curiosity, but merely that his visit might not be quite pointless" - if he can look at the law books he has spied lying on the table in the magistrate's room. The volumes are dog-eared and broken from repeated use; judges have pored over them. At first, the woman refuses but K suggests that they might be able to help each other out - for the woman finds it "so horrible here" (T 60). Access to the law is a matter of bargaining, a matter of back-scratching, a *quid pro quo*. In an austere passage, Kafka describes K's discovery of the books onto which the law has been displaced. K "opened the first of them and found an indecent picture. A man and a

⁵ R. Girard (1978) Violence and the Sacred, p. 189.

⁶ On the unbounded as the ethical failure of legal wisdom, see D. Cornell (1989) "Post-structuralism, the ethical relation and the law", Cardozo Law Review, vol. 9 pp. 1587ff.

woman were sitting naked on a sofa, the obscene intention of the draughtsman was evident enough, yet his skill was so small that nothing emerged from the picture save the all-too-solid figures of a man and a woman sitting rigidly upright, and because of the bad perspective, apparently finding the utmost difficulty even in turning towards each other. K. did not look at any of the other pages, but merely glanced at the title page of the second book, it was a novel entitled: *How Grete was Plagued by her Husband Hans*. 'These are the law books that are studied here,' said K. 'These are the men who are supposed to sit in judgement on me.'"(T 60-1).

K's ironic incredulity at the "personal tastes" of the men who sit in judgement is not without warrant. In reading case reports, it all but impossible not to notice the judiciary's lascivious and lengthy examination of the details of the material judged obscene. Alternatively, there is the Prosecuting Counsel's repeated insistence on the "four-letter words" in Lady Chatterley's Lover. In his opening address, Mr Griffith Jones, Senior Treasury Counsel, states that against the background of bawdy conversation, of legs, loins and breasts, "words - no doubt they will be said to be good old Anglo-Saxon four-letter words, and no doubt they are - appear again and again. These matters are not voiced normally in this Court, but when it forms the whole subject matter of the Prosecution, then, members of the Jury, *we cannot avoid voicing them*. The word "fuck" or "fucking" occurs no less than thirty times. I have added them up, but I do not guarantee that I have added them all up. "Cunt" fourteen times; "balls" thirteen times; "shit" and "arse" six times a

piece; "cock" four times; "piss" three times, and so on."⁷ When the incredulity of such formulae is repeated in cross-examination, it operates as little more than the reiterated bark of the legal order: do you *really* mean to tell me that's literary! Griffith Jones cross-examines Graham Hough:

GJ: Is that really good writing?

GH: I think he is trying to describe a woman in a highly emotional and disturbed condition, and this is his method of doing it.

GJ: We can all "try to describe". A mere child learning to write her first composition can "try to describe". That is not what I am asking. I am asking: do you regard that as good writing, to repeat again and again "womb and bowels", "womb and bowels", and "bowels and womb"?

GH: In the context, yes.

GJ: And it does not finish there, because if we can go on to the next page, almost at the end of the long first paragraph "womb" appears?

GH: Yes.

GJ: Then a little bit further down page 141, towards the bottom, at the end of that longish paragraph the two words "womb" and "bowels" appear again?

GH: Yes.

GJ: Is that really what you call expert, artistic writing? ⁸

But it is not only the prosecution that needs its repetitive formulae of obscenity. Against the insistence of the prosecution, the defence argues that repetition is a formal literary device through which Lawrence tries to resurrect the language of sexuality from the euphemism, the silence, the moralism in which it has been buried. As such, the formulae are constituted as expressing a meaning, a meaning pitched against the fear of "simple glyphs", of "dissolving into dots". What is defended against here is the possibility that the story, the literary thing, might be "mere padding", off-stage.⁹ In short, both counsel need their obscenities:

⁷ C.H. Rolph (ed) (1990) The Trial Of Lady Chatterley: Regina v Penguin Books Limited, p. 20

⁸ C.H. Rolph (1990) op.cit., p. 48.

⁹ For the anxiety of the defence, see C. H. Rolph (ed) (1990) op.cit.. The quotes come from pp. 81, 99, 32 respectively. See also pp. 31 and 34.

whether it be in the insistent tone of cross-examination of the prosecution, or in the literariness of the defence.

Moreover, it is not just the persona of the legal and literary officials that are turned on by reading and saying the formulae of obscenity. There is also the linguistic text of law. Some fifty three years before The Trial was published, and some sixty three years before its translation is published in England, the Court of Common Pleas was asked to decide whether a law report itself could be obscene. With such a question, the legal institution is confronted with the limits of its dogmatic language. The Court of Common Pleas reconstituted itself as a site of language the one characteristic of which is exteriority - out-side and still-born. In the prosaic language of the Court, it was stated that the text is not a law report and therefore it is obscene.¹⁰ The common law is always already faced with the possibility that the text of judgement is an obscene language. We remain then with Kafka.

The absence of law is first of all a question of its places, its sordid sites of enunciation. That absence does not issue in a chain-novel, unless the chains are the props in a sado-masochistic genre of pornography about which lately much has been said. And neither is it

¹⁰ Whether or not the text was a law report, and as such whether or not obscene, was not a question of the content of the text. But rather of its form: whether or not the decision was reported as if it was a law report. But even that cannot be fixed by the dogma of law. With the irony of history, there are two *different* reports of the decision: Steel v Brannen (1872) The Law Times (New Series) XXVI 509, and Steele v Brannan (1872) The Law Reports (C.P) VII 261. My remarks on dogmatic language take their terms from R. Barthes (1977) Roland Barthes By Roland Barthes, p. 63 drawing a contrast with decomposing language. See also Y. Hachamovitch (forthcoming) "Legislating Phantasms", Cardozo Law Review.

Hercules who sits on the bench but rather an "all-too-solid" figure of uprightness¹¹. With such ironic deflations of the place of law, Kafka constructs an image of a law that does not occupy centre-stage. Law is displaced: off-scene, *ob-scaenus*. Not that it is displaced to somewhere else, to an outside, where it comes to rest. It passes through the personal sexual tastes of the judge and prosecutor, through the literary conventions of the canon, through the reason of the law, through the legal tie of the social contract, through the masculinity of the one who looks. And it does not stop. The obscene is displacement, and if I say that, it is not a figure of speech. To borrow a phrase used by Derrida to describe something else, the obscene is that which "*determines the noncenter otherwise than as loss of the center*".¹² Neither absence nor presence, the off-centre is that which remains

... Of law. But also of sexual difference. In hermeneutic terms, the obscene is obvious, self-evident. And it is that self-evidence which

¹¹ In contemporary jurisprudence, the emblematisation of law as a chain-novel and the judge as Hercules can be found in R. Dworkin (1986) *Law's Empire*. For a critical reading of these rhetorical instances, see C. Douzinas, R. Warrington, S. McVeigh (1992) *Postmodern Jurisprudence*. See also P. Minkinen (forthcoming) "The Law-Giver's Place: on the unethical quality of legal wisdom", *Social & Legal Studies*.

¹² J. Derrida (1981) "Structure, Sign and Play in the Discourse of the Human Sciences", in *Writing and Difference*, p. 292. Derrida juxtaposes a Rousseauistic and structuralist attitude to play and a Nietzschean attitude to play. The latter is an affirmation which "*determines the noncenter otherwise than as the loss of the center*. And it plays without security. For there is a *sure* play: that which is limited to the *substitution* of *given* and *existing*, *present*, pieces. In absolute chance, affirmation also surrenders itself to *genetic* indetermination, to the *seminal* adventure of the trace." While Derrida displays a marked preference for the Nietzschean affirmation, the argument is not, as some have suggested, that the Rousseauist tendency is to be abandoned. The juxtaposition rather works to argue that we cannot do without both, that *it all happens* in the privileged play between the two. To this extent, my use of the phrase in the body of the essay is out of place, is itself obscene.

constitutes the impossible desire of law. All that remains is the "utmost difficulty" of the sexual relation - the difficulty that a man and a woman find "in turning towards each other" (T 61). In terms of a subjective fascination with law, K averts his eyes at the moment of revelation, such that what is revealed is the concealment of the obscene text. Seeing the indecent picture of law, he does not look any further and "merely glances" at the title page of the second book of law: *How Grete was Plagued by her Husband Hans*. The title would suggest that what turns the judges on is the site and sight of masculinity playing aggressor to femininity's victim. The direction of the pestilential agency is reversed however when it comes to K's relation to the woman in the office. The law is revealed to K in a *quid pro quo* agreement with the wife of the Law Court Attendant but K imagines himself plagued by the flattery of the woman and interrupts the exchange. "'So this is all it amounts to,' thought K., 'she's offering herself to me, she's corrupt like the rest of them, she's tired of the officials here, which is understandable enough, and accosts any stranger who takes her fancy with compliments about his eyes.' And K. rose to his feet as if he had uttered his thoughts aloud and sufficiently explained his position." (T 61-2). It is *as if* K had communicated his thoughts, *as if* he had indicated his position to the woman. The *quid pro quo* is an exchange of nothing for something. There is no sexual relation which can be recouped from behind the obscene text. To recoup is, before all, to recut. In Lacan's formula: "there is no sexual relation"¹³. And it is the consequences of that

¹³ The formula occurs in the now infamous essay "God and the *Jouissance* of The Woman" (in which the "the" of "the woman" is crossed out - a tactic of erasure that my word processor will not do), in J. Mitchell and J. Rose (ed) *Feminine Sexuality*, p. 143: "Now then, this *jouissance* of the body. If there is no sexual relation, we need to see, in that relation, what purpose it might serve." Cf. earlier in the essay at p.138: "I will be elaborating the consequences of the fact that in the case

trauma, that interruption which has to be thought. In other words, beyond epistemology and before ontology, law and sexual difference meet in the displacement that Kafka styled as the obscene text. That is the limit which reading the obscenity of law will have knocked its head against more than once. The obscenity of sexual difference is the limit of the ethical.

In the way of a departure: current tales

*Remember that we sometimes demand definitions for the sake not of their content, but of their form. Our requirement is an architectural one: the definition is a kind of ornamental coping that supports nothing.*¹⁴

In a contemporary politics enchanted with the margins, with that which exists off-stage, the obscene has moved centre stage. Such a movement is no doubt marked by the contemporary cultural recognition of pornography rather than obscenity. But traces of the obscene - signifying the object and target of *legal* rather than cultural recognition - remain..... Before proffering a description of that remainder, that legal practice within which the obscene is constituted as an intelligible object, it is necessary to describe the contemporary critical judgements of pornography.

How have we been made to speak in and on what terms do we participate in the name of the obscene? The demand for definition is rife

of the speaking being the relation between the sexes does not take place, since it is only on this basis that what makes up for that relation can be stated."

14 This has an undefined place in L. Wittgenstein (1968) Philosophical Investigations.

in the contemporary debates about pornography¹⁵. But then we should perhaps note that, although pornography is mentioned in the law, it is not used as a legal term of art. When it comes to use, the law is not without its formal definition of obscenity - or more precisely, an obscene publication. First formulated in 1868, then put on a statutory footing in 1959 in England, the definition of obscenity as that which has a tendency to deprave and corrupt is an achievement.¹⁶ It of course has its problems - problems of clarity, problems of workability, and so on - and so we mustn't be too satisfied. And of course we mustn't forget that the category of obscenity has been overtaken by that of "indecent display", and indecency is notoriously difficult to define - not just in the law of pornography, but also that of child sexual abuse (indecent assault) and of homosexuality (gross indecency).¹⁷ These concerns

¹⁵ A recent example is to be read in E. Jackson (1992) "Catharine MacKinnon and Feminist Jurisprudence: a critical reappraisal", Journal of Law and Society vol. 19 no.2 pp.195-213. Therein it is stated that the test in the USA is "prurient interest" and the test in the UK is "tendency to deprave and corrupt", but that "neither offers clear guidelines as to what will be considered obscene" (p. 204) and that the concept of obscenity is "ill-defined and nebulous" (p. 207). More substantially and historically, see J. Hoff (1989) "Why Is There No History Of Pornography?", in S. Gubar and J. Hoff (eds) For Adult Users Only, pp. 17-46 where it is noted that "The essential male definition is now meaningless" (p.31) and thus proposes an extended definition of what she calls "pornotica" (p. 26). The demand for definition has been given an added fillip by the reactions to the MacKinnon-Dworkin Ordinance in Minneapolis and Indianapolis. For a legal reading that represents itself as sympathetic to the Ordinance but which largely rewrites it as a definitional enterprise, see L. Robel (1989) "Pornography and Existing Law: What The Law Can Do", in S. Gubar and J. Hoff (eds) op.cit. pp. 178-97.

¹⁶ The 1868 formula is provided in Queen v Hicklin (1868) LR 3 QB 360. It is put on a statutory footing in section 1 of the Obscene Publications Act, 1959.

¹⁷ The mutation of obscenity into indecent display is coincident with a move in that which is to be regulated from the written to the visual. Ironically, this move is effected once a definition of obscenity is granted statutory form in 1959 - and a literary defence is appended to the definition. That is, a definitional enterprise functions to exempt that which is defined as obscene. The mutation is explicitly worked out as a

would seem to substantiate Smart's proposition that "[t]rying to define what pornography is remains the most contentious issue of all". But then what is at stake in the contention over definition is not so much what is pornography as what is to be done about it. Definitions are important and contentious because they have a pragmatic pay-off: "Clearly if something is to be done about 'it' in terms of public policy we need to have a workable definition."¹⁸ Clearly, what is not in issue is the *demand* for a *workable* definition. It is around such a demand that the available problematisations of obscenity may be sketched. In this respect, two narratives - and a hybrid third - can be discerned.

A first - and perhaps the least interesting - story is a positivist enterprise which searches for the more or less determinate meaning of obscenity in the formal rules of the common law. Anxious at the imminent prospect of legal absence, the interest of such a story is to demand a clear and precise definition.¹⁹ Its horizon is that legal reason is thrown, as a pot is thrown, into a good form; its hope is to direct law towards its sensible image. In its most extreme forms, this interpretation becomes a simple recounting of the various statements which have been made on the legal meaning of obscenity. The value of such

problem in the order of vision in The Report of the Committee on Obscenity and Film Censorship (1979), Cmnd 7772. And is legislated in the Indecent Displays (Control) Act 1981. See also the Video Recordings Act 1984, and the Cinemas Act 1985.

¹⁸ C. Smart (1989) Feminism and the Power of Law, p. 118.

¹⁹ For a hyperbolic exemplar of this narrative and its demand, one could do no worse than C. Manchester (1991) "A History of the Crime of Obscene Libel", Journal of Legal History, vol. 12 no. 1 pp. 36-57. The ironic, if unwittingly, conclusion of the article is that the common law crime no longer exists, has withered away and disappeared. The history is a history of nothing.

statements is that they are presumed to regulate the application of law, to keep in check a law that is always-already liable to run wild. Since definitions are boundary markers, the absence of a definition is symptomatic of the incursion of the extra-legal into law's imperium. The decisions of judges and other enforcement agencies are made on the basis of subjective moral opinions, personal tastes or, what is worse, the biases of non-legal "interpretive communities" such as social scientists, literary critics, film boffins. Of course, these non-legal elements are allowed some play but only if the legal interpretation has the last word. If they play anything more than a subornate and subordinate role, then what is conjured up in the legal imagination is the spectre of indiscriminate and arbitrary decision-making. In short then, the good form of law is at the same time a workable practice of law: a *more or less* determinate meaning functions to guarantee a *more or less* determinate application of the rules. It is as such that definitions are usually described as "tests": the law as test functions both to demystify the meaning of obscenity and to decriminalise the pornographer, to reveal the obscenity of a text and to cleanse the stain of criminality that constitutes the pornographer.²⁰

A second narrative tells a tale in which the accent is firmly placed on the contexts in which pornography appears as a problem. In this respect, legal institutions will have been continuous with wider social

²⁰ On the liberal logic of "tests" in the legalisation of the pornography debates, see B. Brown (1990) "Debating Pornography: The Symbolic Dimensions", *Law & Critique* vol.1 no.2 pp. 131-54 at p.140: "the idea of tests is one of the basic techniques in legal argumentation as a way of determining the choices between available, preconstituted alternatives. A test does not represent the essence of a position but its outward and visible sign. It is thus the perfect mechanism for asserting and deferring issues, balancing principles and pragmatism".

and cultural definitions of pornography. Formal legal definitions are thus either subordinate to or justificatory of other practices that will continue - or simply exacerbations of those same practices. Rather than law determining the meaning of obscenity, society will have determined both the legal meaning of obscenity and the cultural meaning of pornography. The advantage of this shift from formal texts to social contexts is that the question of control that had been implicit in the previous narrative is now rendered explicit. However, the key suppositions remain unaltered. First, the meaning of obscenity is *more or less* determinate; the source of that determination has shifted from the legal to the social. Second, and consequently, the control of obscenity is *more or less* (successful) censorship; either the pornographic or the law will have run wild. In short, a grammar of meaning logically entails and practically guarantees the (de)regulation of pornography.

The third and hybrid narrative takes place within a more general enthusiasm for anti-essentialism. Here, pornography is styled as an "*ad hoc* institution"²¹: it is a regime of meanings the coherence of which is

²¹ The phrase is from J. Ellis (1980) "Photography/Pornography/Art/Pornography", Screen vol.21 no.1 pp.81-108. The essay is a classic in the genre that emerged in film and literary studies in the wake of the Report of the Committee on Obscenity and Film Censorship in 1979. For a sampling of these debates, see B. Brown (1980) "Private Faces in Public Places", Ideology & Consciousness, no. 7 pp. 3-16; B. Brown (1990, orig. 1981) "A Feminist Interest in Pornography: some modest proposals", in P. Adams and E. Cowie (eds) The Woman In Question, pp. 134-48; L. Stern (1982) "The Body As Evidence: A Critical Review of the Pornography Debates", Screen no.23 pp. 38-60; R. Coward (1987, orig. 1981) "Sexual Violence and Sexuality", in Feminist Review (ed) Sexuality: A Reader, pp. 307-25. For specific critical responses to both Ellis and Brown, see C. Pajaczkowska (1981) "The Heterosexual Presumption: A contribution to the debate on pornography", Screen vol. 22, pp. 79-92; and P. Willemen (1980) "Letter to John", Screen, vol. 21, no. 2 pp. 109ff. An attempted rapprochement between this strand in the debates and the radical feminist interpretation of pornography can be read in S. Kappeler (1986) The Pornography of Representation.

coincidental and discontinuous - whether that discontinuity is specified synchronically or diachronically. Such an emphasis on the contingency of meaning, as Brown has remarked²², has been invariably concerned with the status of images - the conventions of genre through which distinctions between erotica, pornography, family snapshots, advertising billboards are instituted. Moreover, in as much as this story interrogates the law of obscenity, it is the law of the erotic representation and, consequently, the stylistic techniques in and through which images captivate a *subject* as a gendered viewer and reader of pornography. Such analyses have primarily been associated with literary and film studies. However, in recent years, they have gained a certain currency in the jurisprudential description of legal discourse. And needless to say, in the process the arguments have metamorphosed. In fact, although the jurisprudential reading leans on the work done in film and literary criticism, it can be more accurately described as indebted more to the now-familiar "indeterminacy thesis" of the critical legal studies in the United States.²³ Thus, the narrative insists that formal definitions cannot fix the legal meaning of pornography, that the meaning of the pornographic image is itself ambivalent, and more generally, that the meanings of pornography cannot be unified at the level of the social.

22 B. Brown (1990) "Debating Pornography", op. cit. at p. 137.

23 For the conversion of a conventional socio-legal interpretation into an anti-essentialist approach to pornography and legal discourse from a feminist perspective, see C. Smart (1989) op.cit. and discussion below. M. Merck provides a reading of the law on obscenity feminist film theoretical position which is not burden by the tradition of critical legal studies - see M. Merck (1992) "From Minneapolis to Westminster", in L. Segal and M. McIntosh (eds) *Sex Exposed*, pp.50-64. A conspectus of the critical legal studies movements is usefully appraised in P. Goodrich (1992) "Critical Legal Studies in England", Oxford Journal of Legal Studies vol. 12 pp. 195ff; and *idem* (forthcoming) "Sleeping With The Enemy".

What is of note here is that the recourse to incoherence, to plurality, to ambivalence operates as a denial. And it is on this basis - on the basis of a negation - that the anti-essentialism of critical legal studies has identified itself with postmodernism, post-structuralism, discourse analysis, and other *bon mots* of cultural criticism. Thus, whereas the contingency and discontinuity of meaning in the filmic tradition of criticism has been deployed to open up and specify the possibility and preconditions of intervention in the pornographic institution, the indeterminacy and incoherence of the critical legal studies tradition has been deployed to undercut the desirability and possibility of any recourse to law. Thus, Smart notes that "the renewed vigour in attempting to deploy law in the cause of women ... collides with the recent and profound recognition in feminist theory deriving from other disciplines [i.e. other to socio-legal studies], that to invoke an unproblematic category of Woman, while presuming that this represents all women, is an exclusionary strategy".²⁴ In addition to being theoretically defective, the recourse to law - whether that be in the form of "pragmatic lobbying devices" or in the form of legislation - is politically retrograde: "we should perhaps become more acutely aware that the *content* of our message may be overlaid by meanings already encoded in the *form* we are using. In such circumstances we may find that we further empower precisely the wrong people, regardless of our intentions."²⁵ Faced with the indeterminacy of meaning - and particularly legal meaning - the recourse to law is inherently risky. But

²⁴ C. Smart (1992) "The Woman of Legal Discourse", Social and Legal Studies, vol. 1 no.1 pp.29-44 at p.30.

²⁵ C. Smart (1992) "Unquestionably A Moral Issue: rhetorical devices and regulatory imperatives", in L. Segal and M. McIntosh (eds) Sex Exposed, pp. 184-99 at p.199 (italics in original).

more than this, the risk is styled as dangerous; law is always-already likely to be used against minorities, against feminist and gay erotica rather than the porn "we" find objectionable. The existence of risk forestalls and forecloses any recourse to law: it is as if law is dangerous because you can never be certain of the outcome. Hankering after the purity of a risk-free position, law is formulated not so much in the absolutist terms of prohibition but in the softer terms of "hegemony" or the "dominant interpretation". In this morality tale, it is results that count and, since results cannot be determined in advance, then any recourse to law is guilty in advance of trying to determine that which cannot be determined - or, in more social terms, dominating that which is already subjugated.

At the risk of granting Smart an undue privilege, her arguments in Feminism and the Power of Law are exemplary of this hybrid narrative. The chapter on pornography is divided into two parts.²⁶ The first half describes the various positions in the pornography debates according to how they *define* pornography. The second half describes the way some of these positions - and most notably the radical feminist position - have used law to translate a feminist ethics into a legal politics. The overarching aim of the chapter is the pedagogical one of clarifying and correcting both the definitions of pornography and the "resort to law". Its primary argument is that the meaning of pornography is indeterminate and thus that we cannot go to law. Smart, after targetting the radical feminist attempt to legislate against pornography, thus concludes: "Denying law is a solution to pornography is not to deny that

²⁶ C. Smart (1989) op.cit.

pornography is a problem. Nor is it to encourage a sort of complacency which assumes that it will wither away of its own accord. For example, I am less certain than Segal (1987) that pornography is a sign of men's weakness or 'the last bark of the stag at bay'. But we need to consider carefully what sort of problem pornography is ... It is vital to remember that the meanings of representations is [*sic*] not immutable or unitary, although there may be dominant forms of interpretation. The benefit of the strategy of using civil law was that it allowed for a new interpretation of pornographic representation, its deficit was that it seriously attempted to use law to enforce this definition. Pornography is an issue which clearly reveals the limits of law in terms of feminist strategy. It reveals that there are major problems in transforming any feminist analysis of women's oppression into a legal practice, as if law were merely an instrument to be utilized by feminist lawyers with the legal skills to draw up the statutes. Such a strategy is even more doubtful when there is no consensus amongst feminists about the nature of the problem, let alone its solution."²⁷

With such cost-accounting, very little is gained. Having formulated the problem of pornography as a problem of its meaning(s), the problem of power is posited as the *imposition* of meaning - and in particular, a single meaning where there are and should be many meanings. It is this caveat concerning the "dominant interpretation" which returns to provide the force of the Smartian denial of law. While the meaning of pornography is indeterminate, the power of law is that it determines the meaning of pornography. What is wrong with law is that it has the

²⁷ C. Smart (1989) op.cit., pp. 136-7.

pretention to lord it over other interpretations. Law functions as the unitary, the immutable, the sovereign, the prohibitive. And thus to be avoided - at all costs. I have characterised this narrative as a hybrid because of the way it deals with the notion of control. Whereas the second narrative eschewed the formalism of legal rules in order to delineate the substantive practices of the legal institution, this third narrative returns to the formal legal rules and describes the legal form as itself indeterminate. Moreover, rather than describing the telos of legal regulation as *either* successful censorship *or* failed censorship, the hybrid narrative shuttles back and forth between success and failure. Thus, it insists that censorship *both* succeeds *and* fails. Just as the meaning of pornography is ambiguous, so too the legal control of pornography is ambivalent. Despite signing itself in the name of post-structuralism, for this narrative, everything happens within the orbit of meaning: the force of law is the force of meaning - albeit polysemic meaning. Before the law there is no dispersion - only denial and foreclosure.²⁸

If these then are three narratives in the contemporary rendition of the problem of pornography, the interest in such a classification is in the way the legal problematisation is set up. First and foremost, the problem of obscenity is a problem of meaning - whether the meaning of representation, of law, of the social. In doing so, the question of control

²⁸ Cf. J. Derrida (1991) "Jacques Derrida: Interview", in R. Mortley, *French Philosophers In Conversation*, p. 97-8: dissemination "is a principle of multiplicity which is not merely polysemy: I distinguish in a number of places between polysemy and dissemination. Polysemy is a multiplicity of meaning, a kind of ambiguity, which nevertheless belongs to the field of sense, of meaning, of semantics,... Dissemination is something which no longer belongs to the regime of meaning; it exceeds not only the multiplicity of meanings, but also meaning itself."

is not thereby excluded; rather it is subordinated to the imperative of meaning. The problem of controlling obscenity is formulated as the *more or less* successful production, construction and imposition of meaning - a meaning that is determinate or indeterminate, legal or extra-legal, singular or plural. In short, the legal strategy of control is figured as simultaneously either successful *or* failed prohibition. It is against such a reading that this chapter returns to the legal judgement in The Queen v Hicklin, a judgement that took place in the late nineteenth century.²⁹ Neither formal text nor social context, this judgement is re-inscribed within the general text of the obscene.

As with the chapter on incest, I begin with the self-evidence of the judgement. But here rather than reading that self-evidence as a process of denial, the self-evidence is posited as a positive force of the judgement. As such, it is to be *read*. The legal problematisation of obscenity is described neither as a question of meaning nor a question of prohibition. Rather the legal pathology of obscenity is a problem of jurisdiction and policing. The contours of that problem are quite specific - although not distinctive of law. As such, the remainder of the chapter moves from the text to the intertext of Queen v Hicklin. That intertext is not something extraneous to the judgement but rather is embodied in its imaginary. And it is there that the obscene passion of socio-legal reason takes place.

²⁹ The Queen v Hicklin (1868) LR 3 QB 360.

The aporia of definition

*Today it is impossible to say for certain why people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable.*³⁰

The Moonstone by Wilkie Collins is published in 1868. It is the first detective novel and belongs to the mid-century genre of "sensation novels" - novels which, as Miller has argued, problematised the somatic responses of their readers and did so along the lines of a gendered sexuality.³¹ 1868 is also the year of another sensation which explicitly focusses on the somatic responses of young females kneeling behind the black grilles of the confessional box. The title of the text could easily have been how young females are plagued by their father-confessors. It is however: *The Confessional Unmasked; showing the depravity of the Romish priesthood, the iniquity of the confessional, and the questions put to females in confession.*

According to Henry Ashbee, a mid-nineteenth century bibliophilic collector and annotator of erotic works, the pamphlet had been written early in the nineteenth century. It largely consists of reprinted extracts from the writing of catholic theologians. These extracts are reprinted in the pamphlet in the original Latin, together with a parallel translation in English. In the first half of the pamphlet, the extracts are used to illustrate and condemn what the anonymous compiler of the pamphlet calls the "theology and morals" of the Roman Catholic church.

³⁰ F. Nietzsche (1969) On The Genealogy of Morals and Ecce Homo, p. 80.

³¹ D. Miller (1989) "Cage Aux Folles", in E. Showalter (ed) Speaking of Gender; W. Collins (1966) The Moonstone.

Juxtaposed to the casuistic debate, the second half of the pamphlet consists of further extracts which illustrate and condemn the practices of auricular confession. Under cover of this practice, priests were eliciting from "young females" a confession of the flesh. As the compiler puts it, the extracts are given "without abridgement, to shew what minute and disgusting details these *holy men* have entered". The compiler is aware that, in reprinting these extracts, the pamphlet might be considered obscene. As if to assuage his readers, he notes in the preface that his purpose is not a "filling of the work with obscenity". For Ashbee, nevertheless, the pamphlet was obscene but not obscene enough since "some of the most disgusting enquiries and instructions by the Priest were omitted"³².

The bibliophile was not the only reader who took it for granted that the pamphlet was obscene. On April 28 in 1868, the Court of Queen's Bench gave its considered judgement in the case of "THE QUEEN, on the prosecution of HENRY SCOTT, Appellant, v. BENJAMIN HICKLIN and Another, Justices of Wolverhampton, Respondents". The verdict was that the appeal must fail - the justices at first instance had acted properly. It did not however decide that *The Confessional Unmasked* is or is not obscene. The case report nevertheless does attribute the following statement to Chief Justice Cockburn: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such

³² Quoted in W. Kendrick (1987) *The Secret Museum*, p. 253 fn 46. Ashbee is discussed at length in S. Marcus (1966) *The Other Victorians*, ch. 2.

immoral influences, and into whose hands a publication of this sort may fall."³³

According to Manchester's history of obscene libel, "[a]lthough the definition was only *obiter* ... this seemed to be the first attempt that had been made to formulate a legal definition of obscenity."³⁴ With only a slight change in the wording, Cockburn's test - or definition - was put on a statutory footing in section 1 of the Obscene Publications Act 1959. There have been some mutations in the part played by Cockburn's test, but nevertheless it has provided and still provides *the* legal definition of obscenity.³⁵ In short, what is significant about the case report is its definition of obscenity.

³³ The Queen v Hicklin (1868) LR 3 QB 360 at 371. All further references to this report are included in the main text, preceded by the initial H. Despite copious archival searching, the *Confessional Unmasked* remains undiscovered. Its remains are buried in the footnotes to this case report and it is from these that I have extracted the quotes and description of the previous paragraph.

³⁴ C. Manchester (1991) op.cit. p. 47.

³⁵ The mutations are primarily two. The first is that, although its wording wasn't significantly changed, its use was altered by being placed alongside a defence of literary merit in section 4 of the Obscene Publications Act 1959. This defence transferred the regulation of erotic representations from the legal to the literary institution: the latter institution conceived primarily in terms of a formalist literary pedagogy concerned to clarify and correct the meaning of texts and the meaning of citizenship. For the history of this literary institution, see I. Hunter (1988) Culture and Government. One effect of this mutation was to exempt written texts from legal regulation. The second mutation builds upon this exemption. Visual pornography is regulated not so much as obscenity but as indecent display - and the mode of regulation is primarily classificatory. Rather than being prohibitive, the circulation of visual materials is regulated by ranking the materials according to permissible audiences. On such matters and the relation between obscenity and indecent display, see the judgement in R v Gibson, R v Sylveire [1990] 3 WLR 595. Both these changes are mutations rather than progressions in the law of obscenity.

The privileging of the definition eclipses some nine and a half pages of the case report. It is also debatable whether the test had any more than an indirect relation to the verdict in the case. These remarks aside, the priority of the definition in the prevalent reading of the judgement is enveloped within a larger narrative. In this narrative, the significance of the definition gives a determinate meaning to obscenity and a determinate application of that meaning. With a test in hand, you can't go wrong. To be sure, prior to 1868, obscenity was prohibited but these formal prohibitions were without a rational foundation. The meaning of obscenity varied: confusion and muddleheadedness reigned in the courts, the parliament, and the wider society. Lacking a definition, the prohibitions were applied in an unruly manner. The common and statutory laws were applied inconsistently, and had indiscriminate or, what Kendrick calls "hole-and-corner", targets.³⁶ As such, The Queen v Hicklin represents the triumph of rationality where previously the irrational and the obscene had prevailed. Of course within the irrational, so the story runs, it is possible to glimpse some beacons of enlightenment in the form of statements that anticipate the Hicklin definition. Thus, the case of Dugdale in 1853. This particular case involved an indictment which charged the defendant with procuring obscene prints with the intention to publish them. In upholding the indictment, Lord Campbell CJ - a man to whom we will return - stated that what was being procured was "the abominable offence of circulating

³⁶ W. Kendrick (1987) op.cit. p. 120. It is interesting to note that the pre-1868 law is positioned by this story in the same manner as *The Confessional Unmasked* is positioned by the legal judgement: both are rejected for their lack of discrimination, their mobility and their extension. In short, both are all over the place.

obscene prints to deprave and corrupt the public morals".³⁷ Moreover, in the same way that Campbell's statement is anticipatory so, as Manchester remarks, Hicklin's case is only an "attempt" at definition.³⁸ It was a step in the right direction but not a complete success. Its subsequent history has thus been a series of refinements and alterations which have progressively clarified the legal meaning of obscenity on both sides of the Atlantic. The history of obscenity law for which The Queen v Hicklin is the pivot is thus primarily a history of the clarification and correction of the definition of obscenity, and consequently the bringing under control of the wayward and unruly application of the law.³⁹

While such a positivist emphasis on formal definition repeats the traumatic effects of Hicklin, it also excludes a history of the substantive features of obscenity law. For that, it is necessary to turn to a description

³⁷ R v Dugdale (1853) Dears 64 at 75. The language of abomination communicates with one strand in the contemporaneous law of buggery. As to which, see the discussion of the history of homosexual law in chapter 4.

³⁸ C. Manchester (1991) op.cit. p.47.

³⁹ The strategy of clarification and correction attributed to the legal institution is isomorphic with the academic's approach to pornography. Thus, S. Marcus (1966) op.cit., p. xvii: "To the exhilaration of being alone in an area where almost none had ever been before, there was added the anxiety that one had only one's own personal and very fallible sense of judgement to rely on. I have tried - as I trust the reader will see - to make very clear just where and how that judgement is being exercised; but there is no doubt in my mind that errors have inevitably crept in as well ... [therefore] as I finish this work I look forward to the publication in the future of other studies, by other hands, which will amend, correct, enlarge, and go beyond such findings as I have been able to make". More generally, the strategy is not confined to a narrative that includes an explicit mention of Hicklin. An exemplar is C. Smart (1989) op.cit. whose arguments on pornography are in the mode of clarification and correction of the contemporary debates and, specifically, of the radical feminist position. In short, criticism is *tekhne krinein*.

of how the case of Hicklin stands vis-a-vis the wider institutional, social, cultural and ideological relations of the mid-to-late nineteenth century. And depending on your polemical bent, the case of Hicklin would then either underwrite or resist those wider relations. The key figure (*topoi*) in this story is not so much the definition of obscenity but the text being adjudged obscene.⁴⁰ It is the text adjudged obscene rather than the legal definition of obscenity which provides access to the social meaning of obscenity in the mid-to-late nineteenth century. It is however not this turning which I wish to take on the road to Hicklin. As I have already argued, the legal problem of obscenity is simply not a problem of meaning - whether definitional, social or ideological. Put differently, the legal problematisation of obscenity begins not so much with *The Confessional Unmasked* but with the action of the Watch Committee in the borough of Wolverhampton.

The Committee had directed a police officer to bring a complaint against a "metal broker ... of respectable position and character" (H 362) by the name of Henry Scott. The complaint is brought before two Wolverhampton justices who issue a warrant permitting the police officer to enter Scott's house in order to seek out and seize copies of the pamphlet called *The Confessional Unmasked*. The warrant is issued under the Obscene Publications Act, 1857.⁴¹ In the event, two hundred and fifty two copies of the pamphlet are seized by the police and

⁴⁰ The focus on the text adjudged obscene is usually found in literary histories - or, more generally, cultural histories - and is prompted by a reading retrospectively filtered through section 4 of the Obscene Publications Act 1959.

⁴¹ Two years after this Act, James Stuart Mill's On Liberty is published. No warrant is ever issued against it. Nor is it ordered to be destroyed.

ordered by the two justices to be destroyed "as being obscene books within the meaning of the statute" (H 362). At the Quarter sessions, Henry Scott appealed against the order of destruction. The Recorder at Quarter Sessions is Benjamin Hicklin and an unnamed other. Hicklin quashed the order of the two justices and directed that the copies of the pamphlet that had been seized now be returned to Henry Scott. On request from the prosecution however, Benjamin Hicklin stated a case for the Court of Queen's Bench. It is the judgement of this court which is reported - first the reporter's summary and telegraphic introduction, then the arguments of the respective counsel (with interpellated judicial interrogation), then the judgements of Cockburn CJ and his "brothers" Blackburn J, Mellor J and Lush J. What is to be noted then is that the legal problem with which the Court is confronted is a jurisdictional one - and particularly summary jurisdiction. The initial question was not what is obscenity; rather the question posed was what are the limits placed on the powers of justices: the *limits* of the power of justice to issue search and seizure warrants, and to destroy books deemed to be obscene. The respondent in the appeal is not Scott but Hicklin, a Recorder at Quarter Sessions. He is not simply caught up in the dispute as his conventional stylisation as "hapless Hicklin" suggests; he is in fact the central problem which the Court addresses.

If he is the central problem, he is not the only problem. Henry Scott is also involved. Returning to the facts, it is also necessary to note the way in which these facts translate the conduct of Henry Scott into a problematic legal event. Scott is described as a metal broker who is "a person of respectable position and character". He is not disreputable, and nor is the Protestant Electoral Union to which he belongs. The

specific target of this Union is the practices and pedagogy of the Catholic Church - and in particular, of the Romish Jesuits. These are indicted as engaged in a conspiracy conducted by foreigners to pervert the morality and liberty of Protestant England. The aim of the Union is thus to protest against this perverted conspiracy. In furtherance of this aim, the Union's central office in London had printed copies of *The Confessional Unmasked*. Occasionally Henry Scott would purchase some of these copies from the Union at the price of 1 shilling per pamphlet. He would then sell them at the same inexpensive price. Not only did their price make them readily available, but Scott would sell the pamphlet to *anybody* who would ask for them. In this manner, he managed to sell between two and three thousand copies. In short, what is problematised in the behaviour of Henry Scott is that which Blackburn describes as the "occasion" (H 376) and Cockburn as the "circumstances of the publication" (H 367): the production, distribution, sale and circulation of the pamphlets. All involved in the case take-for-granted that the circulation was, in Blackburn's tortuous phrase, "the indiscriminate circulation of it [the pamphlet] in the way in which it appears to have been circulated" (H 376).⁴²

As Kafka realised, the problem of law is the problem of its sites of legal enunciation. In the specific terms of Hicklin, it is a problem of jurisdiction. That problem is twofold: what powers are granted to the justices to order the search, seizure and destruction of matter deemed to

⁴² Alternatively, Cockburn CJ offhandedly notes: "This work, I am told, is sold at the corners of streets, and in all directions, and *of course* it falls into the hands of persons of all classes" (H 372, italics added). Given that the problematisation of obscenity is to be read in the self-evidence of the reasoning, the syntax and tone of the various comments quoted become extremely important.

be obscene, and what is the problem to which those powers are addressed. In this specific sense, the status of the images in *The Confessional Unmasked* are irrelevant. And further, the Cockburn definition of obscenity is neither central nor marginal to, neither the *ratio* nor the *obiter* of, Hicklin's case. Throughout the nineteenth century, there was no desperate need for a legal definition of obscenity which Chief Justice Cockburn's definition either succeeded or failed to satisfy. None was demanded because the legal apparatus took for granted that none was required. It was assumed that the relevant players in the legal institution knew very well what obscenity was. It was self-evident, taken-for-granted, obvious: certain publications were, in Cockburn's terms, "manifestly obscene" (H 373).⁴³ If the legal judgement and its reason is to be read, then the absence of definition must be read positively. Obscenity was a problem but a quite precise problem: who has the power to speak the law and to whom is that problem addressed. As a problem of jurisdiction, the Hicklin decision is not some departure from that which had previously existed; it is not some innovation without legal precedent. If precedent be needed, then the reading of the problem of jurisdiction can start with the statute under which the justices ordered the seizure and destruction of *The Confessional Unmasked* - namely, the 1857 Obscene Publications Act.

The Act - known as Lord Campbell's Act, after the the person who proposed it to Parliament - is part and parcel of the extension of summary jurisdiction that had proceeded apace from the early

⁴³ That it was taken for granted is indicated by the fact that obscenity is "manifest" but also that Cockburn's term appears in the subordinate clause of a sentence on the issue of a publisher's intention.

nineteenth century.⁴⁴ One function of the Act was to specify the powers of summary justice in the particular context of obscene publications. It gives to magistrates powers to authorise search and seizure warrants, and also powers to order the destruction of obscene publications kept for sale or distribution. The statute is thus concerned with the administration of justice by "constable or police officer" and by "two justices, metropolitan police magistrate or other stipendiary". What is required of the magistrate is that he be "satisfied" that the articles be of an obscene "character". It is the satisfaction of the magistrate rather than the character of the article which is problematised by the Act. Blackburn makes this clear when, in Hicklin, he firmly places the emphasis of his account of the 1857 Act on the magistrate and his satisfaction - he has to be satisfied that the article is kept for the prohibited purposes, he has to be satisfied that the publishing of the article would be a misdemeanour, and he has to be satisfied that it is proper to prosecute. The Act does not spell out a characterology of obscenity - because it was assumed that whether or not a particular publication is obscene was obvious. It is this tradition of obviousness which informs the now-infamous claim by Justice Potter Stewart that "I know it when I see it"⁴⁵. As in the 1857 Act, certain publications are

44 On this extension and the correlative changes in the composition of the magistracy, see R. Vogler (1990) "Magistrates' Courts and the struggle for local democracy 1886-1986", in C. Sumner (ed) Censure, Politics and Criminal Justice.

45 The apocryphal announcement is to be found in Jacobellis v Ohio (1964) 378 U.S. 184 at 197: "I have reached the conclusion ... that under the First and Fourteenth Amendments criminal laws in this area are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligently doing so. But I know it when I see it, and the motion picture involved in this case is not that." For a sampling of similar statements, see M. Leach (1975) I Know It When I See It.

manifestly obscene and as such a definition would be otiose if not impossible.

The effect of this self-evidence, this silence, was not that pornography remained unregulated. Quite the opposite. It was the administration of obscenity which was addressed and specified in some detail in the 1857 Act. In this sense, Kendrick is way off the mark when he notes that, in mid-century England, Parliament and the judiciary operated with "a typically English confidence that the system would prevail indefinitely, and that laws were all the better for neglecting to specify the provisions that ought to govern their enforcement".⁴⁶ Rather, what is striking about the 1857 Act is that it is devoted entirely to establishing and setting out the best way of administering the problem of obscenity. As the Act proclaims, its concern is with "effectually preventing" and "expedient to give additional powers for the suppression of the trade in obscene" materials.⁴⁷

The 1857 Act, then, addresses itself to the problem of controlling the indiscriminate circulation of obscenity. Moreover, a crucial element in this legal problem of control is that the law discriminate between the obscene and the non-obscene. In the parliamentary debates on the 1857

⁴⁶ W. Kendrick (1987) *op.cit.* p.119. The site of enunciation that Kendrick takes up here is not "typically english" but "typically American" - the self-confident belief that to *state* something is all there is to language and to change.

⁴⁷ It should also be noted that many of the jurisdictional provisions of this Act have simply been incorporated into all subsequent legislation, and in particular the current Obscene Publications Act, 1959. The difference is that in 1857 these regulatory provisions could not be taken for granted, whereas now they can. Most subsequent commentaries make no mention of the jurisdictional provisions that subtend the 1959 Act.

bill, the following exchange between Lord Campbell and Lord Lyndhurst indicates the way in which the problem of meaning is displaced by a question of circulation, and consequently the way in which the problem of control is formulated as a question of legal discrimination.

Lord Lyndhurst begins by taking for granted that the trade in obscenity should be suppressed but then tries to disrupt the specific technology proposed by the 1857 Act. He states that "My Noble and learned Friend is to put down the sale of obscene books and prints; but what is the interpretation to be put upon the word 'obscene'? I can easily conceive that two men will come to entirely different conclusions as to its meaning". The rhetorical question allows Lyndhurst to frame the problem of obscenity as a problem of (plural) meaning, and having so framed it, to raise the spectre of a lack of legal discrimination between obscenity and literature, obscenity and the classics. Dryden "has translated the worst parts of Ovid - his Art of Love - works for which Ovid was exiled, and died, I believe, on the shores of the Euxine. There is not a single volume of that great poet which would not come under the definition of my noble and learned Friend's bill."⁴⁸ Lord Campbell's reply was that he had no intention of making the works of a Juvenal or a Voltaire or a Byron subject to seizure by the police. Rather the 1857 Act was "intended to apply exclusively to works written for the purpose of corrupting the morals of youth, and of a nature calculated to shock the common feelings of decency in any well-regulated mind. Bales of

⁴⁸ Quoted in W. Kendrick (1987) op.cit. pp.116-7, as is the following reply from Lord Campbell. There is no necessity - other than polemical - to point out that Lyndhurst's argument is repeated by C. Smart (1989) op.cit. p. 137, quoted at length in the previous section of this chapter, not as "two men" but as "two feminists" coming to different conclusions.

publications of that description were manufactured in Paris, and imported into this country". As an example, he brandished before the House of Lords an English translation of Dumas' La Dame Aux Camelias. Such a work would not be captured by his Act. In an argument that anticipates John Stuart Mill's formulation of the legitimate domain of the law, Campbell claimed that, although polluting, such works can only be controlled by the force of public opinion and improved taste.⁴⁹

As Campbell's response indicates, the question which the 1857 Act required the justices to ask was not - is this obscenity or literature, obscenity or politics, obscenity or theology? These distinctions and consequently their possible confusion, their homologation, were not operative in the mid-century law of obscenity. In fact, such distinctions did not exist as such. Nevertheless, the law did propose a discrimination between the obscene and the non-obscene. Such discrimination was engendered by the collective image of obscenity which the 1857 Act presupposed the judges used.

Fletcher has argued that criminal law operates with a "collective image" of the wrongdoer, and moreover that a transformation of this collective image can be traced to the late eighteenth century.⁵⁰ In the

⁴⁹ Cf. J.S. Mill (1962) "On Liberty", in Utilitarianism. What is all-too-often forgotten by legal readers of Mill is that, in delimiting the domain of the operation of law, Mill does not simply take a hands-off approach but accords a role to the force of public opinion in regulating that which falls and simply outside the operation of law.

⁵⁰ G. Fletcher (1976) "The Metamorphosis of Larceny", Harvard Law Review, vol. 89, no. 3, pp. 469 - 530. On the history of criminal law more generally, see *idem* (1978) Rethinking Criminal Law.

pre-modern or classical law, one of the two structuring principles of the criminal legal image is a narrative of manifest criminality. Although Fletcher makes this argument in the context of a history of the modern law of theft, his description is pertinent to obscenity law. In this context, there is no need for a definition because the justices are making their decisions on the basis of a narrative of manifest obscenity. That which is obscene is self-evidently so. Such a narrative is however not some sort of generalised mind-set or conceptual arrangement, a sort of cultural "ideology" or "dominant interpretation" with which the legal problem of obscenity is continuous. Nor, in a more semiotic vein, does the narrative of manifest obscenity provide a "deep structure" of law.⁵¹ It is both more mundane and more circumstantial than that.

The circumstantial criteria of legal recognition can be grouped under three headings. Within each heading there are numerous elements and it is the concatenation of these elements in any particular case which constitutes the legal recognition of manifest obscenity. A first group is captured by an investment of law in the manifold *technology* of production, distribution and sale. Thus, the publication would be obscene by virtue of its price, its provenance,⁵² the print-run,⁵³ how the

51 The formulation of the structuring principle as a conceptual arrangement is primarily Fletcher's, *op. cit.*; the ideological formulation is to be read more generally in the Gramscian inflection of cultural studies; the structural formulation is derived from a Greimasian semiotics as deployed in the narratological reading of Fletcher's arguments provided by B. Jackson (1988) Law, Fact and Narrative Coherence, and *idem* (1979) "Towards An Integrated Approach to Criminal Law", Criminal Law Review 621ff.

52 "Paris" often functioned as the signifier of obscenity, as it does in Lord Campbell's reply to Lord Lyndhurst quoted above. In The Trial of Lady Chatterley is Port Said - with which the Charing Cross Road in London is compared. See C. H. Rolph (ed) (1990) *op.cit.*

materials get into the country, and once in the country where they are sold.⁵⁴ A second group of features relate to the *form* of the material - to the plastic and graphic qualities of the material to be adjudged obscene. Here, the genre,⁵⁵ the shape,⁵⁶ the size, typographical variations, the use of the double page, quotations and extracts (whether they are correctly extracted), the translation (the language of the ur-text, and whether it is a "free" translation),⁵⁷ the use of specific figures of speech,⁵⁸ and the binding of the publication - in short, the distribution of

53 Again, Campbell offhandedly notes that "bales" are coming in from Paris.

54 Lord Campbell again avers that the problem of obscenity is a problem of importing - if it is of foreign provenance, then the problem of obscenity immediately becomes a question of ports: the docks and the warehouses on the wharves. And then a problem of tracing the route from the ship to the streetcorner seller, and the itinerant peddler. In current terms, the policing of obscenity is very much a problem of customs control. After giving an earlier version of this paper in Canada, I returned to England. As is usual I was stopped by the customs officials who this time displayed immense interest in the book on pornography that I was carrying: L. Williams (1989) *Hardcore*. However, they displayed an even more intense interest in K. Silverman (1992) *Male Subjectivity At The Margins* which, unlike Williams' book, contains numerous pictorial illustrations.

55 Is the material pictorial (usually referred to as "indecent prints"), written, and if written a "tract", "treatise", "pamphlet"? All of these terms are used in Hicklin.

56 In Hicklin, Cockburn describes *The Confessional Unmasked* as a "whole [of that between the priest and the person confessing] put into the shape of a series of paragraphs" (H 371).

57 These features are again drawn from Hicklin.

58 Starkie's treatise on the law of slander and libel includes among the "circumstances of publication" - "contumelious and abusive expressions" and "a display of offensive levity" (quoted in Hicklin at p. 366). Obscenity emerges as an additional discrimination within the law of libel: initially only treasonous and blasphemous, obscenity was added as a further type of libel. Blasphemous libel has returned somewhat to the regulation of pornography: with the exemption of writing from the offence of obscenity, blasphemy has been sometimes been used to take up the slack.

signs across the surface of the material took on a legal signifi-⁵⁹ Finally, a third group of features of manifest obscenity relate to the question of *consumption*: the categories of reader, the nature of the typical readers, and the effect on the reader of the prosecuted material. This issue is not a literal one (who actually read the material) but empirical and categorical (who is likely to read).⁶⁰ By virtue of all these elements, the law identified an obscene publication as obscene and rendered other publications legally unproblematic. To take but one example - the notorious and anonymous My Secret Life. This "autobiography" was not even a candidate for recognition or misrecognition as legally obscene. It consisted of eleven uniform volumes in small crown octavo and printed on handmade ribbed paper. It was produced in a foreign country (Amsterdam rather than Paris) at the expense of the anonymous author (there has been some speculation that it was the bibliophilic Ashbee). It stated on the title page that it was not for publication. However, somewhere between six and twenty five copies were printed and they retailed for somewhere between £60 and £75, and sometimes as high as £100. In contrast, *The Confessional Unmasked* is undoubtedly recognised as obscene. It was sold at 1s. per copy; it was a pamphlet rather than an eleven volume magnum opus; it had an extensive print-run; thousands of copies were sold; it was sold

⁵⁹ This term is used in contra-distinction to "significance" which suggests that the plastic and graphic signifiers operate in the order of meaning. The attention to these features however indicates that *signifi-^{ance}* always already exceeds significance - it is this excess that constitutes the obviousness of the obscene in the nineteenth century.

⁶⁰ The categories of reader noted in the legal problematisation of pornography are multiple: young and old, masculine and feminine, members of all classes, the pure, the endangered, and the already corrupted. And finally, in the concern with importation, the nation figures as a category of reader: England as the innocent child endangered by corruption and pollution by foreigners.

on street corners and to anyone who cared to buy.⁶¹ In short, then, the legal problematisation of pornography in the nineteenth century emphasised the *graphos* over the *porne*.⁶² The obscene was obvious and therefore not in need of elaboration. Form was privileged over content and, as such, the question was not so much the nature of obscenity but the nature of publication. It is this privilege which renders intelligible the numerous judgements in the nineteenth century on the question of what constitutes a publication.

The legal problematisation of publication was not directed at the author but at the distributors of the material. In the period leading up to the 1857 Act, it was the Society for the Suppression of Vice which had a marked impact on the formulation of the legal problem of obscenity. The Society conducted detailed investigations into the *trade* in obscene publications. As a result, in their First Report in 18??, it was suggested

⁶¹ A curious sequel to the fate of *The Confessional Unmasked* in the hands of the law is pertinent here. In 1870, George Mackey was tried for publishing an edition of *The Confessional Unmasked* revised in the light of the *Hicklin* decision. The jury could not agree and thus were discharged without giving a verdict. In the following year, 181 copies of a report of the trial of George Mackey were seized in Covent Garden and prosecuted for obscenity under the 1857 Act. The report included the "full text" of *The Confessional Unmasked*. By way of case stated, the Court of Common Pleas had to decide whether the publication of a shorthand transcription of an obscenity trial was obscene. The question was answered in the affirmative - and without doubt because the publication did not conform to the typographical and other requirements that discriminate between the law report of obscenity and the obscenity of a law report: a law report comes in uniform volumes, usually bound in the dull colours of moroccan leather, beige or deep red, printed on thin India paper in smaller than average typeface. In addition, they are expensive and have a limited and well-defined circulation. For the specific features of the case, see *Steel v Brannen* [1872] 26 The Law Times CP 509-14. And in case there was any doubt, a different reporting is *Steele v Brannan* [1871-2] 7 Law Reports CP 261-72.

⁶² Cf. S. Kappeler (1986) *op.cit.* p. 2: "The traditional debate has focussed on 'porn' at the expense of 'graphy', an emphasis duly reflected in the customary abbreviation to 'porn'."

that one of the causes of juvenile delinquency in the period was itinerant peddlars selling indecent pictures and obscene pamphlets outside schools.⁶³ But more importantly, between 1802 and 1857, the Society initiated some one hundred and fifty nine prosecutions for obscenity - and all but five were successful. For this, Lord Ellenborough CJ claimed that "they deserved the thanks of all men".⁶⁴ In all these prosecutions, the legal problem turned on the issue of what act or circumstance was necessary and sufficient to constitute a publication. In the late eighteenth century, possession of the material was not enough.⁶⁵ Throughout the first half of the nineteenth century however, the cases brought by the Society began to narrow the scope of possessory immunity and thus to open up the trade routes of obscenity to an increasingly intensive yet well-specified regulation. By mid-century an offer for sale was deemed sufficient to constitute an act of publication. One hundred years later, in the trial of *Lady Chatterley's Lover*, the police, rather than having to wait for the novel to hit the streets, are invited to the Holborn offices of Penguin Books Ltd in order to collect twelve copies of the novel.

63 The Society for the Suppression of Vice (1803) Part The First, of An Address to the Public, and *idem* (1804) Part The Second. The same concern with the trade routes of obscenity was evidenced in a 1787 proclamation by George III which exhorted the suppression of "all loose and licentious prints, books and publications, dispensing poison to the minds of the young and unwary, and to punish the publishers and vendors thereof".

64 Quoted in Report of the Society for The Suppression of Vice, 1825 at p.37.

65 This is coincident with with the principle of possessory immunity operating in the classical law of larceny. According to G. Fletcher (1976) op.cit., the principle operated in tandem with that of manifest criminality.

If the trade routes were the target of regulation, then it was not simply the distributors, shop-keepers, and peddlars that were subjected to regulation. The consumers were also problematised. In 1845, an investigation and prosecution by the Society for the Suppression of Vice resulted in the Carlisle judgement. One of the members of the Society had been offered some prints by Carlisle. When asked if he had anything "more curious", Carlisle took the person into the back of his shop and showed him some obscene pictures.⁶⁶ The officer of the Society bought two of them, and a prosecution against Carlisle was promptly brought. Carlisle's defence was that "looking at the circumstances under which they [the prints] were sold, [they] could never reach the public, [and thus] how can it be said that this will injure public morals."⁶⁷ By 1845, the notion of the law as the custodian of public morality was already familiar, and thus also of the consumer as a member of the public to be protected from acts which are *contra bonos moros*.⁶⁸ It is however not the general public which is harmed by the

66 R v Carlisle (1845) 1 Cox C.C. 229. The request for something "more curious" is readily intelligible as obscene pictures. Not only is it one with the acceptance of obscene as foreign, but it also communicates with the historical and archaeological interest in and discovery of the priapic images recently found in the ruins of Pompeii. On which, see W. Kendrick (1987) *op.cit.*. See also R. Sutton Jnr (1992) "Pornography As Persuasion in Attic Pottery", in A. Richlin (ed) Pornography and Representation in Ancient Rome and Greece, pp. 3-35; and S. Brown (1992) "Death As Decoration", in A. Richlin (ed) *op.cit.*, pp. 180-211. At the same time, anthropology is producing the notion of "primitive fetishism" around the sexual significance of classical mythology. For example, see R.P. Knight (1818) An Inquiry Into the Symbolical Language of Ancient Art and Mythology. In this context, the obscene picture like the fetish discovered in classical mythology is being interpreted as inflaming the sexual fantasies of the viewer and producing impotence. More generally, on the notion of fetishism in nineteenth century literary culture, see D. Simpson (1982) Fetishism and Imagination.

67 R v Carlisle (1845) 1 Cox C.C. 229 at 230.

68 The locus classicus is to be found in The Case of Edmund Curll, Bookseller (1727) 93 E.R. 849. For an extended discussion of this case,

itinerary of obscenity. Rather, the public is formulated as a heterogeneous collection of typical groups. The individual reader is thus determined by her membership in a group. These groups are constructed primarily along the lines of age, class and gender - specifically, young boys, women, and the popular classes. No doubt these categories cannot be homogenised; but they do become problematised in law by virtue of the claim that their *wills* render them susceptible to the effects of obscenity. It is in this context that the familiar themes of fantasy and impotence obtain their resonance. However, fantasy is not formulated as a category of the intellect nor of the imagination. Similarly, impotence does not make an appearance in law as a physical harm. Rather, the erotic effects of obscenity to which the vulnerable categories of the population are subjected by virtue of their wills are *moral* harms. Thus, Lord Campbell argued that the material targeted by the 1857 Act is material which is "written for the single purpose of corrupting the morals of youth". Eleven years later such language and the practice which it specified had become extremely familiar. Chief Justice Cockburn acknowledges that familiarity in repeating it *en passant*: "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall."

There is nothing superficial about Cockburn's test - it is not even profound. I have argued that the legal problem of "obscene publication" is not formulated disjunctively - as if what legally constitutes obscenity

see D. Saunders and I. Hunter (1991) "Lessons from the 'Literary': How To Historicise Authorship", Critical Inquiry vol. 17 pp.479-509.

and what legally constitutes publication are two separate questions requiring separate specification. Instead, the problem of obscenity is enfolded in the problem of publication: the obscenity of a text consists in its publication. Having arrived by way of a roundabout route at the test which originates modern obscenity law, one finds that the test is beside the point. The problem of obscenity is not a problem of meaning to which the issue of legal control can be subordinated. The legal problem of obscenity has a specific and complex rationality. The preceding description suggests that several strands of the rationality can be delineated.

The legal rationality of obscene publications is best described as governmental - with its specific objects, targets, and objectives.⁶⁹ First and foremost, the problem of obscenity is a problem of the control of the legal institution: a question of its jurisdiction, its power to speak the law. In this respect, the law is the judge and his mode of address is undoubtedly brutal - Cockburn CJ poses the issue of the relevance of Scott's polemical and protestant intentions and replies: "My answer is, emphatically, no. *The law says*, you shall not publish an obscene work." (H 372, italics added). Although brutal, the power of law is neither unfettered nor is it restrained. The magistrate, the justice of the peace,

⁶⁹ The term has become associated with M. Foucault's genealogical method exemplified in his essay "Governmentality" in G. Burchell et.al. (eds) (1991) *Foucault Effect*, pp. 87-104. C. Gordon's introductory essay to this collection provides a concise statement of the term at p. 3: "A rationality of government will thus mean a way or system of thinking about the nature of the practice of government (who can govern; what governing is; what or who is governed), capable of making some form of that activity thinkable and practicable both to its practitioners and to those upon whom it is practised". As such, it is to be distinguished from the sociological notion of social control. Governmentality works through problematisation and calculation, and not through imposition on a preconstituted terrain.

the Recorder must be satisfied that the prosecution brought under the 1857 Act is "proper": neither vexatious nor improper but well-founded. It thus also regulates who can come before the law as a recognised bona fide complainant. Which is also to say, that the legal institution discriminates between obscene publications and those not legally recognised as obscene. Blackburn J's interpretation of the 1857 Act is, in this respect, decisive: "the object of the legislature was to guard against the vexatious prosecution of publishers of old and recognized standard works, in which there may be some obscene and mischievous matter." (H 374) Although self-evident, the operative legal criteria for recognising an obscene publication are precise. An obscene publication is one which is characterised by a particular technology of circulation, by the way in which the publication distributes signs across its surfaces, and by its likely readership. In short, the power of law is neither restrained nor unfettered, but *discriminatory* - both as to the interpretation of obscenity and as to the application of its legal rules. Moreover, the legal control of pornography is *intensive*. It formulates its target not simply as the "obscene publication" but as the personal and social spaces of "the public". It thus targets the nodal points of inhabited space in terms of a differentiated topography: the streetcorners and crossroads, the entrances to schools, the backroom shops, the ports. Not long after the 1857 Act, the first Obscene Publications police squad was set up in London.⁷⁰

Such governmentality provides a structure for obscenity law in the nineteenth century. It is a structure which neither homogenises the

⁷⁰ The details of the police squad can be found in E.J. Bristow (1977) Vice and Vigilance, pp.46-7.

heterogeneous instances of obscenity regulation nor fragments those instances into a plurality. Rather, taking my cue from the case report of Hicklin, the structure is *circumstantial*. The case report insistently takes for granted that the problem of obscenity is a problem of circumstances.⁷¹ Such an insistence on circumstance remains in the law subsequent to the 1857 Publications Act and yet is largely ignored by subsequent accounts. By focussing on the largely apocryphal features of the text of Hicklin, it has been possible to reinscribe the self-representation of obscenity law within this question of governmentality; to describe the problematisation of pornography as the obscenity of socio-legal reason. Obscenity takes place where legal reason hooks up with social ontology - and the figure of that linkage is the circumstances of publication.

Three tasks remain. First, although I have described the government of obscenity as specific, it is not distinctive of law. Thus, the displacement of the law's distinction, its sovereignty in matters obscene, must be addressed. Second, the issue of sexuality will have to be returned to the heretofore passionless account of legal rationality. These

⁷¹ A second reason for emphasising the circumstantial nature of the law of obscenity is that the problematisation of pornography intersects with that other debate in the nineteenth century over the propriety of "circumstantial evidence" for legal decisions. On which, see J.F. Stephen (1872) The Indian Evidence Act, with an introduction on the principles of judicial evidence. The problem of circumstantial evidence being formulated a practice of legal judgement which was no longer grounded on direct evidence. Circumstantial evidence solved this problem through recourse to empirical analysis: the particularity of circumstances could be transcended in legal judgement by enveloping them in a narrativised logic. The doctrinal elaboration of this problem in Hicklin is in the semantic context of "intention": whether it is object or effect, purpose or consequences, direct intention or indirect intention which is sufficient to constitute legal intention. Circumstantial evidence is now the daily stuff of criminal trials.

tasks will be conducted simultaneously in the next section. And then finally, a return to the legal judgement to mark the difference Hicklin makes.

Of Poison and Passion: a legal imaginary

*Passion is not so much an emotion as a destiny.*⁷²

It has become customary to read the image-repertoire of pornography for the way in which the patriarchal or phallogentric institution thinks. In contrast, the image-repertoire of law has received relatively little attention. In particular, the legal institution of pornography has been quickly identified with the patriarchal and the phallogentric. In this section, I thus turn to the way in which the legal institution *thinks in images*.⁷³ In doing so, the discussion focusses on two particular legal projections: the emblems of poison and passion.

The language of corruption, of prurience, of depravation and debauchery, of pollution and degeneration, is a persistent theme in the discourse on pornography - and no more so than in legal discourse. In a liberal apologetics, that language has become familiar as an archaic residue of less enlightened times - such that all that remains to be done is to rid the law of its last vestiges of morality. As a radical feminist

72 J. Winterson (1987) The Passion.

73 On this notion of thinking in images and the various approaches to the question, see M. le Doeuff (1989) A Philosophical Imaginary, esp. chap. 1. At p. 2 she remarks that her perspective "involves reflecting on strands of the imaginary operating in places where, in principle, they are supposed not to belong and yet where, without them, nothing would have been accomplished." For a specifically legal analysis, see B. Edelman (1979) The Ownership of the Image.

politics has demonstrated, such a decorative reading of law has its own interest - and no more so than when it is *reacting* to and denouncing (radical) feminism. Thus, the persistence of the language of corruption constitutes a backlash against the advances of feminism.⁷⁴ Whatever else such a description of the language implies, it suggests that the motifs of corruption are central to the legal institution. It is this centrality which I wish to take up here. Rather than being decorative and extraneous to the legal enterprise, this language is constitutive of the desire of law. My interest is in reading *this* language not so much as irreversible but as as irreducible, as pure signifiers, as self-representations - the topoi of a legal institution thinking itself for itself.

It is by way of an analogy that the law formulates the problem of obscenity. A proclamation by George III in 1787 speaks of "loose and licentious prints, books and publications, dispensing poison to the minds of the young and unwary".⁷⁵ The image of the obscene as a dispensary - a dispensary that is at once ideal and material - is taken up again by Lord Campbell when he presents the Obscene Publications Act to Parliament in 1857. Lord Campbell "believed that the administration of poison by design had received a check. But from a trial which had taken place before him on Saturday, he had learned with horror and alarm that a sale more deadly than prussic or strychnine and arsenic - the sale of obscene publications and indecent books - was going on".⁷⁶

⁷⁴ For the feminist argument that liberal libertarianism constitutes a backlash, see S. Jeffreys (1990) Anticlimax, esp. chaps. 2 and 5.

⁷⁵ Quoted in D. Thomas (1969) A Long Time Burning: The History of Literary Censorship in England, at p. 113.

⁷⁶ Hansard Parliamentary Debates, 1857, 4th Series, p. 107.

By way of preliminary comment, I annotate the specific language used here. For Lord Campbell, it is the *sale* of obscene publications which suggests the analogy with prussic, strychnine and arsenic. It is as a problem of distribution that poison is constituted as a metaphor of obscenity. In the proclamation of George III, however, it is not so much the sale but the books and prints themselves that distribute noxious influences. Like pharmacies, it is books and prints which dispense poison. Moreover, these books are not constituted as representations of sexuality, such that the poison which they dispense is sexuality. To a certain extent it is necessary to read literally - prosecutions for obscenity have targetted drugs, a sculpture of a human head wearing earrings composed of freeze-dried human foetuses, representations of violence, comics and cartoons.⁷⁷ These heterogeneous instances cannot be reduced to a category of representations of sexuality. Rather than being referential, obscenity operates associatively. It calls forth something more - more deadly. It is not only more deadly but by the same token it is more stimulating. Obscenity is a figure of excess at the same time as it is an excessive figure. As such, obscenity is undecidable. Such would be one way of reading the toxic metaphor. By recourse to the various

⁷⁷ On drugs and their obscene abuse, see John Calder Publications v Powell [1965] 1 QB 509 and Calder and Boyars Ltd [1969] 1 QB 151; the foetus example is from R v Gibson [1990] 3 WLR 595-605; violence has invariably been used alongside sexuality in definitions of obscenity which rely on the explicitness of the content of representations - see particularly, The Report of the Committee on Obscenity and Film Censorship in 1979. Comics and cartoons have a venerable history adjacent to the history of obscenity. In this respect, see the Children and Young Persons (Harmful Publications) Act 1955 which regulates representations that portray the "commission of crimes or acts of violence or cruelty or repulsive and horrible incidents" - which is not far from a concise description of the contents of many criminal legal reports.

uses of prussic and strychnine, one could trace the logic of the *pharmakon* at work - a logic in which obscenity is curative in as much as it is poisonous, and poisonous in as much as it is curative.⁷⁸ Rather than follow that reading, I trace the associative network of the toxic metaphor in order to delineate the way in which the self-representation of obscenity law is supported by and supportive of a heterogeneous array of practices. In doing so, what comes into view is the sublime practice of a legal judgement thinking in images.

If poison it is, then a first association is with the contemporaneous discourse of public hygiene. For this discourse, health is a problem of topography. Chadwick's monumental discourse of sanitation locates the issue as a problem of air - and specifically, its stagnation in crowded areas of the metropolis. Chadwick's solution - at least one of the techniques he suggested - was to build playgrounds and parks in their midst, to create open spaces which would permit the air to circulate rather than fester.⁷⁹ Another, as Engels (1969, orig. 1892) describes it, is to open up the denizens and dens of the popular classes by driving roads through their condensed habitations.⁸⁰ What both

⁷⁸ A cursory investigation of the composition and uses of strychnine indicates that it (*strychnos*, nightshade) is typically derived from the seeds of the plant *nux vomica*. That moreover, it works by stimulating the central nervous system. As a poison, it produces death and/or vomiting and, as a medicine, it produces intense excitability. On the undecidable logic of the *pharmakon*, see J. Derrida (1981) *Dissemination*, pp. 61-156.

⁷⁹ E. Chadwick (1965, orig. 1842) *Report on the Sanitary Condition of the Labouring Population of Great Britain*, p. 337.

⁸⁰ F. Engels (1969, orig. 1892) *The Condition of the Working Class in England*, p. 84: "The newly-built extension of the Leeds railway, which crosses the lrk here, has swept away some of these courts and lanes, laying others completely open to view. Immediately under the railway bridge there stands a court, the filth and horrors of which surpass all the

these examples suggest is that the social is not simply - not even - an object which was waiting to be described by the appropriate knowledge but rather is constituted as an object open to empirical analysis and planned change. The social is inscribed as a space that can be reformed as a topographic problem open to topographic solutions. Thus, in the discourse of public hygiene, the social body was mapped district by district, sub-district by sub-district, so that the incidence, the ebb and flow of foul-smelling and noxious diseases could be emplotted. Having demarcated inhabited space according to a grid-like pattern, the containment of disease became a problem of regulating the movements of individuals within and between the districts of the social body thus constituted.

It is this intertext that makes the references to previous cases in Hicklin more than simply judicial precedent for a legal decision. The doctrinal issue for which the precedents are invoked is the nature of intention in the law of obscenity. From the perspective of the doctrinal issue, the fact that Blackburn devotes a substantial part of his judgement to cases which address the issue of public hygiene would be merely coincidental. It is of course a matter of coincidence but a coincidence that is striking and necessary. Thus, Blackburn cites a case involving the distribution of "unwholesome and deleterious" bread to children; he elaborates a hypothetical situation involving the rescue of patients in a small-pox hospital which has caught fire; and he refers to "the case in which a person carried a child which was suffering from a contagious disease, along the public road to the danger of the health of all those

others by far, just because it was hitherto so shut off, so secluded that the way to it could not be found without a good deal of trouble".

who happened to be in that road".⁸¹ With such circuitous references as these, the image of poison is not so bizarre. Health is a problem of regulating the *flow* of poisonous diseases; obscenity is a problem of regulating the itinerant - whether that be in the form of erotic works that circulate among the populace, or in the persona of a peddler selling indecent prints, or in the persona of a Henry Scott who sold the publications "at the corners of streets, and in all directions, and of course into the hands of persons of all classes, young and old, and the minds of those hitherto pure are exposed to the danger of contamination and pollution from the impurity it ["The Confessional Unmasked"] contains." (H 372) In the toxic metaphor, it is possible to read the legal institution thinking the social body as topographic and typographic. The individual is defined by his membership in a class or group and, as such, is a *type*: a person with specific traits. Moreover, the group is defined by its spaces, its habitat, its *topos*. Hence, it is stated in 1809 that "whatever place becomes the habitation of civilised men, there the laws of decency must be enforced".⁸² In short, the toxic metaphor is a condensed formula for the circulation of obscenity as a danger to the health of the social body. Moreover, it not only constitutes the problem of obscene publication as social but also formulates the problem of social control as a policing of the streets. As Lush interjects in Hicklin

81 The quotations are from Blackburn's judgement at p. 376 of the report. The case of bread is Rex v Dixon 3 M & S 11, while the case of a contagious disease is Rex v Vantandillo 4 M & S 73.

82 Rex v Crunden (1809) 2 Camp. 89. Cf the discussion of this case in R v Gibson [1990] 3 WLR 595 at 602-3. That the topographic is also typographic is also the import of Mill's formulation of the legitimate domain of law: law is limited only in so far as it deals with civilised people - and Mill explicitly excludes savages and children from the citizenship of civilisation. That exclusion suggests that the socio-legal subject must possess certain traits in order to be within law.

against Scott's counsel, "[i]t does not follow that because such a picture is exhibited in a public gallery [the Venus in the Dulwich gallery], that photographs of it might be sold in the streets with impunity" (H 365). More tersely, Blackburn asserts that the act of obscene publication is "in fact a public nuisance" (H 377).⁸³ Neither the metaphor, nor the practice which it imagines, is wild: the control of obscenity discriminates amongst social spaces and intervenes intensively at the points where the spaces thus mapped intersect and communicate with each other. Henry Scott sells *The Confessional Unmasked* on the street corner - and to those who are on the move, passing by. What is policed is neither the outside nor the inside but the limits, the sites of social *movement*. Thus, Trollope writes of the "regions of absolute vice [which] are foul and odious" but the danger lies on the "outskirts" of these regions: "It is in these borderlands that the danger lies".⁸⁴ The regulation of obscenity operates as a border patrol.

The toxic metaphor not only describes the form that policing takes but it also describes its metaphysic: namely, obscenity is a purposive force which is always liable to go astray and thus its effects must be kept in check. Such a description is suggested by associating the metaphor of poison with the discourse of symbolism in the historical,

⁸³ Blackburn's categorisation of obscenity as a nuisance is of a piece with current formulations of obscenity as offensiveness. For the explicit linking of obscenity and nuisance, see the cases of *Shaw v DPP* [1961] 2 All ER 463, *Knulier v DPP* [1972] 2 All ER 463, *R v Lemon* [1979] AC 617. Most recently, in *R v Gibson* [1990] 3 WLR 595, in which the accused were charged with outraging public decency and public nuisance and which addressed the links between these two crimes and the offence of obscenity in the Obscene Publications Act 1959.

⁸⁴ A. Trollope (1923) *An Autobiography*, at pp. 189-90. Trollope is writing in and of the 1870s.

anthropological, archaeological and literary disciplines of the nineteenth century. In either the classical or primitive mythologies that these disciplines investigated, it was the sexual meaning of the symbolic objects that struck the commentators. But what was both fascinating and troubling, what was surreal, about the symbolism for the nineteenth century commentators was not so much what the objects symbolised but rather their magical powers. The symbolic object - or fetish - was capable of having dramatic effects on its audiences. It was capable of inciting and stimulating the lewd and libidinous fantasies of those who would gaze upon it. Take the Herms: they were stone pillars which were set up on the roadsides, at streetcorners, and other prominent public places in classical Athens. At the top of the pillar was the carved head of Hermes - a messenger god of interpretation and meaning who was also a trickster and joker - and in the front and middle there was commonly carved an engorged and erect phallus. As displaced phallus, the Herm was said to result in the impotence of the onlooker.⁸⁵ No doubt this was a retrospective accounting of the powers of symbolic objects in the face of the unearthing of such priapic figures in the nineteenth century. It resonated with anxieties that the increasing availability of such symbolic objects would cause the same effects on the women, children and popular classes of "civilised" society as those retrospectively attributed to classical and primitive societies. In short, the power of the symbolic object was formulated as causing both mental and physical harm.

85 On the rites of Hermes, see J-J Goux (1992) "The Phallus: masculine identity and the 'exchange of women'", Differences vol. 4 no. 1 pp. 40-75. The nineteenth century formulation of fetishism is here akin to the marxist recounting of commodity fetishism and of ideology. On such homologies, see W. T. Mitchell (1986) Iconology, ch.6. An excellent reading of the fetishistic pleasures of current film pornography which uses Mitchell's analysis is L. Williams (1989) Hardcore, ch. 4.

In thematic terms, the analogy with toxins is not that far removed from such arguments. Obscenity is a toxin because it possesses causal powers. In the language of Cockburn's test, the publications have tendencies; and these tendencies are even more deadly than toxins because the effects of an obscene publication are direct and immediate: the publication of obscenity is an act which "has necessarily the immediate tendency of demoralizing the public mind wherever this publication is circulated" (H 372). The direct effect is harm to the reader.⁸⁶ Of course, it could be objected that, while pornography might have such causal powers not all readers are harmed by these tendencies, whereas everybody is harmed by the ingestion of poison. I have already noted that strychnine has a curative use. But more than this, the word "tendencies" in Cockburn's text of obscenity envisages the possibility of differentiated effects. The effects are direct but the readership is neither individual nor universal but typical - the popular classes, the child, the female. If the contingent reader is a member of an identified category - no doubt substantialist, ahistorical and essentialist - then *ipso facto* they will suffer direct harm. But the metaphysic of the metaphor does not stop with the assertion of the harmful effects of obscenity. The harms are specified as moral: "the effect upon the minds of many of those into whose hands it would come would be of a

86 I am using "the reader" here as shorthand for both the person who looks either at the written or at the pictorial objects. It is not until the twentieth century that the legal institution distinguishes between the written and the pictorial of obscenity. When it does, it exempts writing on the basis that, unlike the visual, it has an indirect relation. In a semiological reading of pornography that has found favour in literary and film studies, and more recently, in legal studies, the exemption of the visual has been made by way of an argument that the effects of the pictorial are indirect. That is, the visual has been read as if it was written.

mischievous and demoralizing character" (H 372). It was held that there was an immediate and direct relation between reading the obscene representation and the will, thereby producing mental representations (fantasies) that constitute moral harms. Of course, it is possible to concede this point (porn induces fantasies or the reader uses porn to fuel his fantasies) yet object that the effects are simply moral - mental and not physical and thus the analogy with poison is misdirected because toxins have a physical not to mention chemical effect on the person who ingests them. In response, it remains to note that the prevalent topology of the passionate body, both in the discourse of symbolism as elsewhere,⁸⁷ held that there existed a relation between moral harm and physiological harm - such that impotence can be both a property of the will and a property of physiology. It is this topology of the social subject which supports Cockburn's attribution of obscenity as the suggestibility of "thoughts of a most impure and *libidinous* character" (H 371). In short, the direct and harmful effects of pornography are posited within a social pathology of the individual which coordinates the mental, the moral and the physiological - a typography of social spaces. It is this metaphysic of passion which the legal institution thinks when it draws from the well of a toxic metaphor: obscenity is more deadly than poison because it sexualises the erogeneous zones of the population - the

⁸⁷ The metaphysic sketched in this paragraph is operative in the discourse of public hygiene but also in medical psychiatry, and in a more general criminal legal context. The most elaborated version is found in J. F. Stephen (1885) A General View of the Criminal Law of England. Stephen is here explicitly deploying Mill's social and political philosophy. The metaphysic that I sketch informs the Millian partition between the operation of law (as sanction) and the operation of public opinion (as persuasion): the effectivity of public opinion is that opinion operates as symbolic object with direct - but this time beneficial rather than degenerative - effects on the mentalities of inhabited space. Cf. the denial of law in C. Smart (1989) op.cit.

psychical, the physical but above all the moral qualities attributed to individuals and groups.

Although quite specific, such a metaphysic and its attendant policing of inhabited spaces is not distinctive of law. The legal institution is a palimpsest of other knowledges. Blackburn acknowledges as much in Hicklin when he refers to the case reports on contagious diseases and unwholesome bread. The intertextuality of *this* case report, *this* judgement, *this* reason is not however analogical and identical. Law is neither opposed to its others nor simply incorporated by its others, nor resolved into a hegemonic culture which holds the opposition together. The discourse of public hygiene, like the other languages mentioned, is supportive and attributive. It is in this sense that the language of corruption and debauchery, contamination and pollution, prejudice and injury, nuisance and mischief, pervades the language of legal reason - as a specifically legal imaginary.

Whereas the toxic metaphor focuses on the itinerancy of obscenity, it is in the second image that the effects of obscenity come to the fore. Here, the problem of obscenity is a problem of consumption - an issue of the effects of symbolic material on its readers, its audiences.

Numerous readers are mentioned in this particular decision. There are those who use "the streets", there are "the people", there are "persons into whose hands it might come" a variant of which provides an element in the test of obscenity as "those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall", and finally there is "every one". Such a generalised readership is

associated with the indiscriminate circulation of *The Confessional Unmasked*. At the same time, and without displacing such universal readership, some discriminations are drawn according to whom it is likely to reach. Thus, nine hundred and ninety nine out of every thousand who are likely to read *The Confessional Unmasked* will not be exposed to the teachings of roman catholicism. The reader is "any one, boys and girls"; the reader is "the young of either sex, or even... persons of more advanced years"; the reader is "the hands of persons of all classes, young and old, and the minds of those hitherto pure". The population projected in the legal judgement is classified according to type - types composed out of numerous traits: age, sex, class, maturity, purity of mind, clean of hand. And there are further types. Three types of students are imagined: students of a catholic pedagogy, students addressed by medical treatises, and "schoolboys". And then last but not least we should mention the judicial type: Mellor J notes that "on looking at this book myself" he could not disagree with the finding of the recorder and the justices that the pamphlet was obscene. Blackburn J agrees, but also notes that anybody who had seen the book would agree (H 377). There is no doubt that such a catalogue of typical readers attributes the classes of the population with ahistorical and universalising essences. But in the intersections between the various categories, the catalogue of types also temporalises the reader as reader - at one point, he is male and young, at another one is female and young, or mature and a member of the popular classes, or a student looking at the illustrations in a medical textbook. As Rousseau puts it in a discussion of pedagogy and sexual difference, "the male is male only at certain moments".⁸⁸

⁸⁸ The statement is made in the context of an account of sexual difference. In a move with Hegelian resonances, the momentary nature of masculinity is opposed to the permanence of femininity: "The male is

Such a catalogue of typical readers does not provide us with the actual readers of obscene publications. We are still dealing with the legal imaginary. Blackburn intimates as much when he comments that "nor do I think that anybody who looks at this book would for a moment have a doubt upon the matter" (H 377). In psychoanalytic terms, the imaginary is one term in a tripartite topology (the other two being the real and the symbolic). It is composed of imagoes. Imagoes are aggressive projections which present themselves as apprehensions of the real. Rather than going on an impossible search for the real reader of obscenity,⁸⁹ let us follow the fortunes of one particular image in the judicial catalogue of typical readers. It has its place in the following passage from Hicklin by Blackburn J: "But I think it can never be said that in order to enforce your views, you may do something contrary to public morality; that you are at liberty to publish obscene publications, and distribute them amongst every one--schoolboys and everyone else--

male only at certain moments. The female is female her whole life ... Everything constantly recalls her sex to her." See J-J Rousseau (1981) Emile, book 5 at p. 357. Cf. T. Laqueur (1990) Making Sex, pp. 193-207. On the *momentariness* of the feminine, see D. Riley (1988) Am I That Name?, esp. the introduction but also at p. 111: to "interpret every facet of existence as really gendered produces a claustrophobia in me; I am not drawn by the charm of an always sexually distinct universe." It is not without pertinence that the name here is not only "woman" but "whore": see W. Shakespeare, Othello, Act IV scene 2. For the Hegelian resonances of the Rousseauist ethics of sexual difference, see G. Hegel (1977) The Phenomenology of Spirit, pp. 273-88, and 290-4.

89 In a feminist reader-response criticism, the search for the real has turned to a search for the female reader of romance, for example. In the genre of men's studies, it has prompted numerous confessions of what it is like to be a porn watcher. The search for the real over against the symbolic is however an impossibility. Evading the delusions of the imaginary is no alternative. The imaginary inevitably blocks us from ever taking a hold of the real. Psychoanalysis does however posit the possibility of thinking "through" the imaginary as imaginary, rather than the imaginary *qua* symbolic.

when the inevitable effect must be to injure public morality, on the ground that you have an innocent object in view, that is to say, that of attacking the Roman Catholic religion, which you have a right to do." (H 377) Rather than the image of a toxin, here there is the memory of a passion, of schoolboys reading obscene publications.⁹⁰ The image associates the problem of obscenity with the discourse on onanism, with the memorial image of a schoolboy masturbator and his hermetic erection.⁹¹

As with the toxic metaphor, several preliminary remarks are in order. If the judgement is read in a linear fashion, then there will have been some thirteen references to the probable readers of obscene publications. Several of these will have mentioned boys, girls, young people, such that it is quite easy to quickly pass over the image of the schoolboy - to assimilate it to all the other types of reader projected in the legal institution. Similarly, in the judgement itself, the image is not pronounced. Blackburn's mention is inserted into the judgement parenthetically - as if it was an afterthought, of secondary importance to the fact that everyone was targetted by the obscene publication. Yet it is not quite an afterthought. The text hesitates over the status of the

⁹⁰ The memory recurs in the twentieth century. See R v Martin Secker Warburg Ltd [1954] 2 All ER 683, being a judgement of the novel *The Philander*. In this case however the memory is of the schoolgirl reader. For the schoolboy reader, see the examination of literary experts in the trial of Penguin Books publication of *Lady Chatterley's Lover*, as transcribed in C. H. Rolph (1990) op.cit.

⁹¹ The schoolboy makes another appearance in criminal legal judgements of the sexual. When it comes to indecency, it is the legal image of the schoolboy sodomite. The affective charge of this particular image for the legal imaginary is that it is an image of the schoolboy sodomising the teacher, rather than the other way round. The case in which the image is formulated is Boradman v DPP, discussed in chapter 4.

schoolboy as reader: he is *both* a specific category separated out from the rest, *and* he is no more than a particular instance of the universal reader. In other words, the schoolboy is a symbol which can stand in for all readers, and he is a symbol which refers simply to itself. And finally, it is necessary to annotate the symptomatic attributes of the projected reader - as male, young and a student. Taking the last attribute first, the student reader that produces so much anxiety in and for the law is matched by Cockburn's narrative of the good student who reads medical treatises for the information they contain and not for the illustrations - illustrations which may or may not be obscene.⁹² As to the second attribute, the young reader is matched by the mature reader who is capable of being depraved but who is better able to resist the blandishments of the obscene by virtue of his/her "advanced" years. As to the first attribute, the boy reader is matched by "the girl". But not quite. The girl images one side of the equivocation that attaches to the schoolboy - namely, she is merely a particular instance of the general reader vulnerable to the impurities of obscenity. In other words, she makes an appearance in order to deny that, in reading, sexual difference matters - as when Cockburn images the reader as "any one, boys and girls".

These prefatory remarks have concentrated on the image of the *reader* in the legal imaginary. In contrast, there is another image buried in the legal imaginary - an image of the female. Whereas the girl is a

⁹² Cockburn's interjection is related to that more contemporary formula of the man who interjects that he only bought Playboy because it has good articles. In this respect, the editorial to the first edition of Playboy promised its readers a lifestyle which would friendship with female acquaintances including a "quiet discussion on Nietzsche, Picasso, jazz and sex".

reader, the young female is an auditor and a confessor - one who hears the questions put to her by Roman Catholic priests and confesses in response. *The Confessional Unmasked* is concerned specifically with the obscenities of the questions put to "females" by the priest during confession. At the level of the reasoning, it is an image that makes only one appearance - albeit in a distorted form. It occurs in the second and third sentence after Cockburn's putative test of obscenity. By way of a syllogism, Cockburn CJ uses the argument Scott proposed to justify the pamphlet as the very reason why the pamphlet is obscene. If the attitude of the priests to their female confessors has a tendency to deprave and corrupt the minds of the females and as such is obscene within the terms of the test he has just proposed, and the pamphlet is designed to expose that obscenity, then the description ("some of the most filthy and disgusting and unnatural description") of that obscenity must be obscene within the terms of the test just proposed. Conclusion: "We have it, therefore, that the publication itself is a breach of the law." (H 371) Aside from the the tort that the syllogism does to the argument of Scott,⁹³ it also evaporates the content of the pamphlet. *The Confessional Unmasked* grants such an importance to the fact that it is females which are questioned in the auricular confession that it mentions them in its title. Cockburn CJ however effaces the fact that it is women who are the objects of representation and simply describes it as a representation of the relation "between the priest and the person confessing". The effect

⁹³ The structure of Cockburn's argument corresponds to the structure of the differend: the necessity to sacrifice one's interlocutor in order to make a position for oneself. On this tortious theme in the liberal apologetics denouncing the MacKinnon-Dworkin Ordinance, see my review of D. Downs in *The International Journal of the Sociology of Law*, vol.18, pp. 264-72. On the differend more generally, see J-F Lyotard (1988) *The Differend: phrases in dispute*.

of this distortion is that it allows Cockburn to align the female auditor with the male reader, and thus to maintain the problem of obscenity as a problem of its effects on that reader. Obscenity in Hicklin is not a question of what is interred *in* the obscene representation, but a question of the effects caused by the obscene publication *on* the reader. The female is thus introjected by the legal institution whereas the male is projected by the legal institution as "schoolboys".

What then are the fortunes of this image in the mid-to-late nineteenth century?⁹⁴ Even if Blackburn hesitates as he recollects the schoolboys, the image nevertheless remains self-evident in and for the judgement. That self-evidence is supported by its familiarity. As previously noted, the Society for the Suppression of Vice had, in the first decades of the nineteenth century, located a problem in itinerant peddlars selling indecent prints outside schools. This was a problem

⁹⁴ No doubt, in following the judgement's attention to the schoolboy, I also repeat the effacement of the female in the legal judgement. By way of reparation for this sacrifice, I add this footnote. There are numerous corpses buried in the *porne* of *pornographos*. One way of excavating them would be to attend to its etymology. The etymology is tortuous. Apart from the frequently reiterated translation of pornography as "writing about prostitutes or whores", two remarks are of interest. First, the copula linking *porne* and *graphos* is equivocal: it is variously styled as writing by whores, writing about prostitutes, and more interestingly, writing on courtesans. In respect of the latter, *pornographos* is thus a tattooing of the body and moreover, an inscription on the female by which the courtesan was recognised as courtesan. In short, *pornographos* was the constitutive trademark of the courtesan. It is this etymology which is well-worked in K. Silverman (1984) "Histoire d'O: The Construction of A Female Subject", in C. Vance (ed) Pleasure and Danger, pp. 320-49. Second, the gender of *porne* is not always feminine. In legal language - which is largely of latin and french extraction - the whore of *porne* is translated by prostitute and harlot. Following the latter, it is interesting to note that it is not until the Enlightenment that harlot comes to denote the feminine gender. Prior to that, the primary reference of harlot (from the french *herlot*) was a young male vagabond. It thus rejoins that strand of the legal regulation of obscenity which targets the nomadic, the itinerant, the circulating text.

which the Society formulated within a discourse on the increase in juvenile crime. Such a discourse was not on the wane by 1868 - the year of the Hicklin decision. In order to address the question of masculinity, I choose however to associate the legal image of schoolboys with the contemporaneous discourse of sexology.⁹⁵

As with the catalogue of typical readers in Hicklin, so sexology constructed an entire poetics of pathology. It is here that we begin to hear of the sexoesthete, the erotomaniac, the coprophiliac, the homosexual, the sadist, the masochist, the fetishist. Amongst such a welter of types, it is the image of the onanist which resonates with the schoolboy reader of porn.

In 1716, an anonymous Englishman publishes the first book devoted to the perils of masturbation. It was called *Onania, or the Heinous Sin of Self-Pollution*. However it did not quite reach its audience - somewhat a failure as a medical text, it found favour primarily amongst the private collectors of erotica. It was not until 1766, with the translation of Tissot's *L'Onanisme*, that the discourse on masturbation got under way in England - and when it did, it constituted a literature that, in the

⁹⁵ Other options would have been to go to a specifically medical discourse on diseases with a sexual aetiology. In this respect, the consensus was that hypochondria was a disease that characterised the male while its analogue in the female was hysteria. Similarly, from the mid-to-late nineteenth century, there raged what was then called the "battle of spermatorrhea". Spermatorrhea is the involuntary emission of semen - particularly at night - and its discoverer noted that it is particularly common amongst barristers. On such matters, and generally on matters medical and masculine, see S. Heath (1982) The Sexual Fix, pp. 18-25 and F. Mort (1987) Dangerous Sexualities. On matters sexological, see L. Birken (1988) Consuming Desire. Of course, J. Weeks (1989) Sex, Politics and Society is indispensable for an overview of sexual regulation in this period.

words of one recent historian, is best described as "incendiary porn". My purpose here is however not to add to the numerous histories of masturbation, but rather with the help of these histories to set out the *shape* of the problem.⁹⁶ And thus how it holds a supportive relation with the schoolboy emblematised in Hicklin.

For the nineteenth century, the problem of masturbation was a problem of pathology. In Laqueur's description, it, like prostitution, is not so much a sexual as a social pathology with sexual consequences: they are formulated as "social perversions visited upon the body rather than as sexual perversions with social effects".⁹⁷ The personal and the social are not opposed but rather intricated in the question of sexual auto-affection. The problem of masturbation is at one and the same time both private and public. The question of its control proceeds along two axes. As a social pathology with personal effects, the control of the process which sexualises the child addresses itself to the moral topography. The features of the moral topography are numerous but their effect is to render the child vulnerable to the pleasures of auto-affection. Controlling the circulation of obscene publications by policing the streets was thus crucial in as much as they had a tendency to corrupt.

⁹⁶ My discussion draws primarily on the following: T. Laqueur (1990) op.cit., ch.6; M. Foucault and R. Sennet (1982) "Sexuality and Solitude", Humanities in Review, vol. 1 pp. 3-21; and M. Foucault (1981) The History of Sexuality Volume 1. The reference to "incendiary porn" is from T. Laqueur at p. 228.

⁹⁷ T. Laqueur (1990) op.cit. p. 227.

As a personal pathology with social effects however, the problem of masturbation was slightly different. If the emphasis was placed on the social effects, then masturbation was a problem of the (re)production of the species. To this extent, the question of control was, as above, one of the moral topography of the *population*. If the emphasis was placed however on the personal pathology, then the problem of masturbation becomes one of short-circuiting the (re)production of the self, a breakdown in the technology of the self. Each entails a different imaging of the masculine.

Where the emphasis is placed on the social effects of a personal pathology, then the problem of the onanist is that he *withdraws* from the social order. The solitude of the "solitary vice" is, according to Richard Sennett, posited as basically antagonistic to the social order.⁹⁸ One path such an antagonism took was as an interruption in a well-regulated seminal economy. By way of an homology between money and sperm, masturbation was both an excess and a waste of a valuable commodity. The former was registered as hysterical symptoms such as the swelling of the tongue, bulging eyes, hair on the palm of the hand(s) used to caress and flagellate the penis, exhaustion and listlessness. According to Carlisle, the "accomplishment of seminal excretion" was physically and psychologically destructive.⁹⁹ The valence of such symptoms was primarily personal. The emphasis on the wastage of spermatozoa was however on the social effects. It short-circuited the processes of reproduction - of the species. The solitary vice, while a personal

⁹⁸ R. Sennett (1982) in M. Foucault and R. Sennett op.cit. p. 20.

⁹⁹ Quoted in T. Laqueur (1990) op.cit. p. 229.

pathology, had social effects: the degeneration and depletion of the species. In one and the same move, the problematisation of masturbation projects an image of women as sperm banks and an image of men as sperm depositors. Or to use MacKinnon's metaphor, man as fuckor and woman as fuckee. No doubt a masculine model of sociability: inter-subjectivity as penetration.¹⁰⁰

Yet the problem of masturbation was a problem of inhabiting not just a social body but also a personal body. And as Foucault remarks, the model of personality is masculine - but a masculinity of erection rather than penetration: "The main question of sexual ethics has moved from the relation to people, and from the penetration model to the relation to oneself and to the erection problem: I mean to the set of internal movements that develop from the first and nearly imperceptible thought to the final but still solitary pollution ... This, I think, is the religious framework in which the masturbation problem ... emerged in our society as one of the main issues of sexual life".¹⁰¹ The problem of control in such a model is a question of governing not so much the population but a government of the self. But we should not subject this to the vagaries of the public/private distinction, which has been deployed in the many debates around masturbation. A crucial element of the strategy which attempted to keep the private sphere inviolate from "external" control had as its positive side, a series of protocols and strictures whereby the subject would accede to socio-legal subjectivity.

¹⁰⁰ C. MacKinnon (1989) op.cit. p. 124. For an excellent discussion of MacKinnon's metaphors, see D. Cornell (1991) Beyond Accommodation, ch.3.

¹⁰¹ M. Foucault (1982) in M. Foucault and R. Sennett op.cit. p. 15

It was to the elaboration of the protocols that promote a passage into subjectivity that the discourse on masturbation was addressed. The problem with masturbation is that it blocked and obstructed that passage into subjectivity. It was as if, with the sensation of masturbation, the body expires, breathless, devoid of meaning. Like the "direct effects" of obscenity, masturbation was a pure sign, it required no self-examination - or what amounted to the same thing, a profusion of thoughts dreams, and fantasies. Just a prick and the self would collapse.

The erection model of masculinity constitutes a metaphysics of the masculine self. The question it addresses, in as much as it is concerned with the figure of the schoolboy, is this: with what *images* can the homunculus of the child be turned a masculine self? In as much as the law of obscenity emblematises the schoolboy, it also addresses that question. However, in Hicklin, the emblem of the schoolboy is most explicitly associated with the discourse on masturbation in terms of regulating the flow of traffic in the streets, the circulation of images throughout the territories of the population. In this sense, the law of images is the "the law of the land". And it is before this law that Henry Scott will have been brought and found guilty of intending to corrupt the law of the landed image.

I have travelled far enough. The enterprise which I have been unravelling can be styled as a heteronomous complex of knowledges, practices and institutions. It is as part of this complex that the particularity of the Hicklin decision becomes imaginable, obvious, self-evident, rational. The legal problematisation of obscenity is a question of the imaginary. It is thus necessary to read the images used in the legal

institution to represent obscenity to itself. That self-representation is one which formulates obscenity as a problem of sexualisation. In morphological terms, the legal imaginary is masculine. But it is a masculinity whose formula is double: *both* a relation to others according to a penetration model, *and* a relation to the self according to an erection model of masculinity. In this double formula, it is possible to read the more familiar terms of liberalism: obscenity is a problem of harm - harm to others and harm to self. And if it is a question of the legal imaginary, that is not to say that the legal institution does not address the real of social ontology. At this level, obscenity law is an enterprise of liberal governance. The obscenity of the real is that the itinerary of certain specified materials have a harmful effect in as much as they sexualise bodily, mental and social territories. Liberal governance is, as all the judges agree in Hicklin, a matter of "the law of the land". It is a law however which forgets its lore and its manners. In the particularity of *this* decision can be read the itinerant lore of doctrine. By way of a conclusion, a sketch of the difference Hicklin makes will be assayed in terms of a mutation in the doctrine of intention, a mutation whose first victim is Henry Scott.

Love Me, Love My Dogma: Obscene Intention

I have noted that the first question in Hicklin was a question of legal administration: the powers of the magistrate to destroy the pamphlet called *The Confessional Unmasked*. At the doctrinal level, this question is formulated as an issue of Henry Scott's legal intention in publishing the pamphlet. Reading the question of administration and the question of intention together, the problem can be stated as one of the limits of

legal jurisdiction: is the control of obscene publications limited to situations in which the sexualisation is intended by the author as publisher? In answering this question, the Hicklin decision will have at one and the same time displaced the arguments of Henry Scott and installed a relatively modern notion of intention in their place. In historical terms, the attribution of responsibility will have been shifted from a formula in which intention is secondary to a formula in which intention is primary. This shift takes place within a dogmatic assertion of the what-is, of the law of the land.

Mr Kydd is Scott's counsel. The argument that he proposes is a familiar one, and entirely traditional - namely, that *mens rea* is necessary. It is necessary to elaborate. In order for a crime to exist, there must be a wilful subject who can be said to possess a guilty mind. Thus, "the criminal intention must be shewn before the justices have jurisdiction, but here that intent is expressly negatived" (H 364, per Kydd). The difficulty of *saying* that Scott has a guilty mind is the difficulty of proof.¹⁰² And it is at this evidential level that the circumstances in which the pamphlet is produced and distributed take on a significance. The circumstances of publication provide the *actus reus* of the crime. And it is only in and through the *actus reus*, the prohibited act, that the mind and intention of Scott can be known and proven. As such, any inquiry as to the intention of the accused must be subordinated to an

¹⁰² The difficulty is suggested by the difference in the following two quotes: a move from a blasphemous inquiry into intention, to an empirical inquiry: "The thought of man is not triable; the devil alone knoweth the thought of man" [Brian CJ. (1477) Year Books, Pasch ed. IV Fi. p.1.2], and Bowen LJ's assertion that "The state of man's mind is as much a fact as the state of his digestion", in Edington v Fitzmaurice (1885) 29 Chancery Division 459.

inquiry into the acts of the accused, into the circumstances of publication. In terms of the doctrinal distinction between *actus reus* and *mens rea*, the privileged term is *actus reus* - and *mens rea* only enters either to confirm or to deny that which is manifested in the *actus reus*. It is this doctrinal structure which Kydd uses when he argues that Scott had an innocent motive in distributing the text of *The Confessional Unmasked*. We can translate this defence in summary form as follows: "Although the circumstances of the publication indicate that the pamphlet is obscene, it only looks that way. Things are not what they seem. My intention in distributing the pamphlet was to do good, to promote english protestantism." The defence of innocent motive works to *unmask* the manifest appearance of obscenity, and thus to deprive the justices of jurisdiction: "the intention of the appellant being innocent, the publication of this pamphlet was not an indictable misdemeanour; and therefore the justices had no jurisdiction to order the copies to be destroyed" (H 363, per Kydd).

It should be stressed here that the defence is not an appeal to "higher intentions". It does not posit the obscenity of the act and then argue that the obscenity is justified by reason of its theological, pedagogical, scientific or literary bent. It is a defence which denies the very existence of obscenity in the pamphlet - as the anonymous author of the pamphlet notes, the pamphlet only *appears* to be obscene. It *is not* obscene. For the argument of higher intentions we have to turn to the judges. For it is the judges who translate Kydd's defence of Scott into a defence of "higher intentions" (at least in a nascent form) and on this basis reject it. Cockburn CJ is explicit and so I will follow the itinerary of his reasoning.

Cockburn's conclusion is that the pamphlet is, "by reason of the obscene matter in it, calculated to produce a pernicious effect in depraving and debauching the minds of the persons into whose hands it might come" (H 370). The reasoning that brings him to this conclusion can be sketched out as follows. Its starting point is a landed image of law: "It is quite clear that the publishing of an obscene book is an offence against the law of the land." (H 371). As such, it is necessary to determine whether the pamphlet is obscene, and concludes that "We have it, therefore, that the publication itself is a breach of the law". Scott published an obscene pamphlet therefore he broke the law of the land. It establishes that Scott has committed a legal infraction and not that he is a criminal. The third and final step in the argument is that, if you break the law of the land, then you are deemed to have known the consequences which follow from the conduct. At times, this presumption of knowledge is assigned to the fact that the obscenity of the pamphlet is "so clear", so obvious. That is, it is matter of the accused's (author as publisher) subjective knowledge. At other times, the presumption of knowledge is assigned to logic: if it is an obscene act, then it must be inferred that behind the act is a criminal intention. Cockburn CJ modestly comments: "I think that if there be an infraction of the law the intention to break the law must be inferred, and the criminal character of the publication is not affected or qualified by there being some ulterior object in view (which is the immediate and primary object of the parties) of a different and of an honest character." (H 370) Whether it is a question of logic or a question of subjective knowledge, the crucial operation here is inferential and circumstantial.

Two effects may be noted: first, the effect on the defence argument and second, the effect on the formal doctrine of intention. Whereas Kydd's defence of Scott asserts that the pamphlet has an appearance of obscenity, the premise of the judiciary's inference is that the obscenity is not a question of appearance but an incontrovertible fact. As such, it excludes by fiat Kydd's defence: if the obscenity is a fact, then there is no space for an intention which controverts and unmasks. Intention can only enter after the determination of obscenity. It operates as an inference *from* the fact of obscenity. Intention supplements the legal infraction so as to constitute the criminality of Scott. In this respect, the Cockburn translation of Kydd's defence of innocent motive is instructive: "We have it, therefore, that the publication itself is a breach of the law. But, *then*, it is said for the appellant, "Yes, but his purpose was not to deprave the public mind; his purpose was to expose the errors of the Roman Catholic religion especially in the matter of the confessional". Be it so. The question *then* presents itself in this simple form: May you commit an offence against the law in order that thereby you may affect some ulterior object which you have in view, which may be an honest and even a laudable one? My answer is, emphatically, no." (H 371-2) Put simply: Kydd's defence never admits that the publication itself is a breach of the law: it argues instead that it only looks that way. And further, it is not argued by Kydd that the pamphlet is obscene, nor that breaking the law is a means to an end, nor that the innocent motive is an ulterior and higher intention - what Cockburn calls the desire that "some greater good may be accomplished" (H 372). But, having translated Kydd's argument into these formulae, the judges can reject every one of them - or at least, the ones which might constitute a defence. For, what is retained from this

translation of Kydd's defence is the imputed admission that the pamphlet is obscene, a breach of the law.

If the negative side of the translation is to render Kydd's defence non-existent and then to rule out that which the judges have put in its place, the positive side of the translation is the transformation of the doctrine of intention.

The category of intention is used by Kydd in the sense of aim or purpose. It is this sense which underlines the notion of *mens rea* throughout most of the eighteenth and nineteenth century. It is also one which enables the intention of the accused to operate as a defence that counters the manifest obscenity which the circumstances-of-publication appear to possess. In the course of the decision in Hicklin however, this notion of intention is displaced, put to one side. Rather than an intention which comes before the conduct and expresses itself in the conduct, intention is used to refer to that which comes after the conduct, to the result of the conduct. It is this distinction which is drawn in the following exchange between Kydd and all three judges (H 366-7). Kydd is quoting from a comment by Lord Eldon on Paradise Lost and Regained to the effect that "the object and effect was not to bring disrepute, but to promote the reverence, of our religion", when Blackburn J interrupts: ""Object and effect;" concede the object here to be good, what was the effect?". Having opened up the distinction, then it becomes possible to assert that, as Cockburn CJ does, a medical treatise with a pedagogic intention (in the sense of aim) can be obscene - but that whether it is subject to a legal indictment will be determined by its intention (in the sense of consequences). Intention in the latter sense becomes a

question of the evidence of circumstances of publication. And it is this difference which Hicklin makes at the doctrinal level. But, in the gap between object and effect, purpose and consequence, criminal legal practices begin to work as evidential practices. If proof of intention is a matter of the circumstances of publication, then the criminal legal practice opens out onto an intensive and wide-ranging investigation of the mores and manners of life. The formulae of intention thus hooks up with with the project for a disciplinary mode of governance - an enterprise whose rationality is the policing of the streets.

Summa

The concern of the previous chapter was to describe the symbolic operations of the debates on incest. In this chapter, however, I have been primarily concerned with that which is more mundane and circumstantial: pornography as a problem of socio-legal reason. As such a problem, it is the legal judgement in The Queen v Hicklin that is decisive in as much as it puts into play the contours of obscenity for the twentieth century. My interest has however not been historical but what might be called genealogical. But as Nietzsche knew, genealogy must fail.¹⁰³ Against the necessity of this failure, the argument has been ventured that the problematisation of obscenity is neither legal nor social nor both. Rather, the law of obscenity is hyphenated: it is the law of *socio-legal* reason. The chapter thus begins by remarking the self-evidence of the obscene within law. But in and of itself, this is not to

¹⁰³ F. Nietzsche (1969) On The Genealogy of Morals and Ecce Homo, p. 80: "Today it is impossible to say for certain *why* people are really punished: all concepts in which an entire process is semiotically concentrated elude definition; only that which has no history is definable."

criticise. The task for criticism is not that the self-evidence betrays a foundationalism or an essentialism - which moreover must be denied. Rather, what is necessary is to describe the contours, and hence the positivity, of that self-evidence. Such a description demanded a reading which shifted its attention away from the definition of obscenity and towards the problematisation of jurisdiction. But this shift was not so much a substitution, as the *enfolding* of obscenity within the problem of the power to speak the law (*juris-diction*). It is as a problem of jurisdiction that the desire of socio-legal reason is refracted in the legal judgement of obscenity. In morphological terms, such a desire is masculine - a desire for the well-founded, the proper, the correct, the upstanding and hermetic assertion of the law. In intersubjective terms, it is also masculine in that it institutes a social ethics of penetration. And finally, in administrative terms, it institutes a political technology of the itinerant. All this has been forgotten by the legal institution and yet has been disinterred not only from the images that are conventionally considered extraneous to the legal institution (the images of poison and passion) but also from the dogma of legal formulae. As such, the desire of socio-legal reason is a desire that the text of law already knows. The rest, as Kafka knew, remains off-stage, *ob-scaenus*.

Chapter Four

THE REVISION OF SODOMITICAL LAW

1967 and "homosexual acts"

We study many times to undo
ourselves ... we arm ourselves
to our own overthrows.¹

¹ R. Burton (1936) The Anatomy of Melancholy, Volume 1, Part 1, Section 1, p. 136.

The last chapter ended by tracing the way in which socio-legal reason comes to desire in the images of a foundational text for the modern law of obscenity. The present chapter continues this focus on the desire of law. It is however concerned with the legal fantasy of the homosexual. The chapter begins and ends by reading case reports. In between, there is a detour which describes a strategy of homosexual law reform in terms of a history which is at once summoned and abandoned by the Sexual Offences Act 1967. The first case reading weaves together a judgement on the ethics of sado-masochism with a philosophical reading of the various ethical attentions of law on the threshold of modernity. The detour through history is designed to raise a problem in and for both the socio-legal regulation of homosexuality and the proponents of its reform. The strategy of the detour is to retrace the discontinuous emergence of the "homosexual-in-law". The final case readings - reports of legal decisions conventionally located in the law of evidence - draws together both the opening gambit and the historical interlude so as to describe the effect of the 1967 Act. That effect is to displace the asymmetry between the homosexual and the sodomite onto an asymmetrical relation between the homosexual and the gay. The argument is that the legal reason of homosexuality is both a practice of simulation and a practice of administration. In this enterprise of administrative simulation, the homosexual emerges as a displaced figure of socio-legal desire.

"Corporal Hurt": The Good of (Legal) Reason

In chapter 2, I concluded with the irreducible touch of the kiss. All-too-briefly, I attempted to specify a demand that issues from the Other, and

moreover, to extract that demand from its legal *reduction* to a peripatetic act in a narrative of incest. I begin this chapter by pursuing, once again, that irreducible demand and its legal reduction. In this instance, the reduction is performed as a narrative of sado-masochism. This hyphenated totality generalises the particular and contingent touch as the formal unity of an assault - most recently defined as "being any unlawful touching of another without that other's consent". That is Lord Lane's summary statement of assault in the 1992 decision of R v Brown and other appeals². The legal question which Lord Lane takes himself as addressing is - what must the prosecution prove in order to "bring home" a charge of assault (B 558). The question is thus immediately one of domicile, of where the law resides. We must therefore start with a reading of the legal institution in its own terms, a reading of its own reason.

The appeal is from the Central Criminal Court before Judge *Rant* where several men had been convicted on numerous counts - including assault occasioning actual bodily harm, aiding and abetting such assault, aiding and abetting keeping a disorderly house, publishing an obscene libel, unlawful wounding, possession of an indecent photograph of a child, and taking an indecent photograph of a child. The sentences ranged from a two year suspended sentence to four and a half years imprisonment. Brown, whose name is taken by the law for its report, is also charged for being tried - in addition to receiving a prison sentence

² R v Brown and other appeals [1992] 2 All ER 552-560 at p.558. All further page references to this report of the decision will be included in the body of the text, preceded by the initial B. It should also be noted that the report relates to the Court of Appeal decision and that, at the time of writing, the House of Lords is hearing a further appeal.

of two years and nine months, he was ordered to pay a contribution towards the costs of his legal aid. On the 3rd, 4th and 5th of February 1992, arguments against conviction and against sentence by several, but not all, of those convicted were made before - if not heard by - the Court of Appeal. Lord Lane CJ, Rose J and Potts J were the residing judges. Lord Lane delivered the judgement of the court.

The first move in this legal event is a translation of an event outside the court such that it falls within the court. It is a recitation of the facts. I will follow his story. With a certain disingenuousness, Lord Lane CJ suggests that the facts were discovered "by chance" (B 557). It should thus be mentioned that the accidental discovery took place during a police operation which has become familiar by its codename: *Operation Spanner*. The ostensible purpose of the operation was to seize obscene publications and related materials. In Brown, the prosecution of the men was based almost entirely on videotapes that had been made by the several accused and which had been turned up in Operation Spanner. The legal institution delivered its judgement then on an acknowledged accidental discovery of an image. Against this contingency, Lord Lane will appeal to the necessity of turning to the contents of the videotapes. And one could be excused for pointing out that it is the necessity of the unhappy consciousness: "It is, unhappily, necessary to go into a little detail about the activities." (B 555).

The appellants "belonged to a group of sado-masochistic homosexuals who willingly and enthusiastically participated in the commission of acts of violence against each other for the sexual pleasure which it engendered in the giving and receiving of pain." (B

555) That would seem to decide the matter. It is a conventional and utilitarian formula of the relation between sadism and masochism: the masochistic personality obtaining pleasure *in* the pain inflicted by the sadistic personality who in turn takes pleasure *in* the pain of the masochist. Sado-masochism is an unholy couplet formulated in terms of a logical causality between pain and pleasure. I will spend some time uncoupling this duo, and re-marking the assymetries which the law condenses in its formulation of sado-masochism. But for now, I continue to follow the path of the resentfully unhappy. Lord Lane, after setting out where the appellants "belong", follows the prosecution's practice of cutting the videotapes up into numerous scenes, each scene providing a charge. Lane thus describes some twenty-nine charges (or "counts") in terms of their characters, props, and bodily territories (B 555-6). In addition to the appellants, the characters include a man A, the victim T, the victim G, and Mr I. The props included branding wire, blowlamps, matches, rulers, map pins, a spiked glove, stinging nettles, a cat-o'-nine-tails, canes, benches, whips, teeth, bare hands, belt, strap, hot wax, syringe needle, candles, safety pin, scalpel, sandpaper, clamps, thistles, riding crop, studded belt, nails, fish-hooks, fingers, and razor. Lane singles out "what can best be described as genital torture" for particular mention, but the practices range across numerous bodily territories: nipples, navel, testicles, penis, buttocks, inner thighs, back, body hair, urethra, scrotum, blood, skin, foreskin, groin and "all over the body". Juxtaposed with such a variegated scenic display, is the fated reduction of the legal question. On the appeal against conviction, the question is whether the consent of the victim provides a defence to a charge of assault. Lane concludes that the consent must be within good reason and "[w]hat may be good reason is not necessary for us to decide. It is

sufficient to say ... that the satisfying of sado-masochistic libido does not come within the category of good reason" (B 559). If reason is the issue, then it is the reason of law. Yet, in this tribunal of reason, the moral law cannot be stated. The law is undecided on what constitutes the good. The case thus returns to the ethical aporia on the threshold of modernity.

MS: an ethical aperture

In order to approach this strange non-necessity of a decision as to the good - and hence the contingency of the legal decision in R v Brown - I start with Plato after Kant. The concern will have been to describe the various *attentions* (in both its military and psychological senses) that a modern conception of the law provides³.

In a Platonic conception of law, the places of ethical obligation, knowledge and action are coordinated along two dimensions. The attention which we give to the laws relates them either to an ultimate and sovereign good or to the consequences of legal decisions. On both dimensions, the laws are representations - any particular law represents the ultimate Good and the consequences of a particular legal decision represents the good will of the wise. Together, both dimensions provide a frame in which we come to know the law of the laws, and a frame of action in which we come to be obligated to the laws.

³ My account weaves together the case report of R v Brown with the arguments of G. Deleuze (1991) Coldness and Cruelty, esp. chap.7. For a lucid account of male subjectivity and masochism, see K. Silverman (1992) Male Subjectivity At The Margins, chap. 5.

What place then for the laws? In the Platonic formulation, legal rules are secondary phenomenon. They are variable and are placed below the ultimate law of morality. Legal rules revolve around the Good. Moreover, the ultimate law of morality is unknown and cannot be reduced to its representation in any particular law. The laws are thus representations which function to make known that which is unknown. The Platonic conception not only locates the laws in the frame of knowledge, but it also frames our obedience to legal decisions. On this dimension, the laws are repetitions of the will of the wise. It is the sage - the one who knows how to master himself - who legislates and interprets the law for others. Laws are the expression of the good will of the sovereign philosopher. And it is for this reason that the citizen obeys. The consequences of obedience to the laws is that one constitutes oneself as an image - to obey is to conform oneself to the image of the philosopher as the good. The laws are thus formulated as *via media* between knowledge (of the good) and action (as conformity to the best will in the world). In short, the ethical relation is a matter of conforming oneself to the Forms - what is good and what is best.

The Platonic schema not only allocates a precise place to the laws, but also to the consent or conformity which is given to legal rules. If obedience is a question of proximating the Good, then freedom exists in the gap between the image of the Good (the laws) and the Good as such (moral absolutes which are unknowable). One can thus refuse to obey the legal rules and appeal to a higher principle of the Good. Alternatively, then it is again possible to refuse to consent to the good

will of the sage and conform oneself to a will that is even more righteous than the philosopher-judge.

In sum, then, there are two axes to the Platonic conception of the laws. On one axis, it is a question of the laws' relation to an ultimate and sovereign Good; on the other axis, it is a question of the laws' relation to the best will of the legislator-judge. The laws are thus plural and secondary phenomena, divorced from but representing the good and the best. And obedience to the laws is a matter of coming to know and conforming oneself to that which is represented by the laws.

My concern however is not so much with the platonic metaphysic of law and morality, but with what happens to this metaphysic in and after modernity. If the Platonic metaphysic sets up the laws as dependent on a philosophy of the good and best, then on the threshold of modernity the philosopher-king will have been dethroned as guardian of the good. With Kant, philosophy "lapses" into legality⁴. It becomes jurisprudential, and ethics becomes social and historical. The effect will have been to dramatically re-orient the ways in which we are captivated by the law of the laws, and thus our subversions of the law.

⁴ See J-L Nancy (1991) "Lapsus Judicii", *PLi* vol. 3 no.2 pp. 16-40. For further considerations of the Kantian installation of modernity, see G. Rose (1984) *The Dialectic of Nihilism*; M. Foucault (1991) "What is Enlightenment?", in P. Rabinow (ed) *The Foucault Reader*; T. Murphy (1987) "Memorising Politics of Ancient History", *Modern Law Review*, vol. 50 pp.384-405; C. Douzinas and S. McVeigh (1992) "The Tragic Body: The Inscription of Autonomy in Medical Ethics and Law", in S. McVeigh and S. Wheeler (eds) *Law, Health and Medical Regulation*, pp. 1-31.

In the Critique of Practical Reason, Kant makes the Good revolve around the law. Rather than the laws being made to depend on an ultimate Good, that ultimate is made to depend on a sovereign legality. Now it *is* possible to talk not so much about the laws but about The Concept of Law⁵. Thus, also, the slippage between rule and value such that the law *is* as it *should* be. And further, it is within this Kantian orbit that the decision in R v Brown takes place.

In the Platonic formulation, the law of the law is radically other to but represented in the laws. With Kant, however, the institution of the law is self-grounding - or, in more colloquial terms, law will have pulled itself up by its own bootstraps. Law is thus closed off from the good, or rather encloses the moral law within itself. The validity of laws, their legality and legitimacy, is granted solely by their form. The law is ungrounded and its content is undetermined. As Deleuze notes, "Kant, by establishing that THE LAW is an ultimate ground or principle, added an essential dimension to modern thought: the object of the law is by definition unknowable and elusive."⁶ If the object of judgement is obscure, then the law will have demanded that ignorance of the law is no excuse but it might mitigate the sentence: Lord Lane will thus allow that "we are prepared to accept that the appellants did not appreciate

⁵ Cf H. Hart (1961) The Concept of Law. But also any of the numerous legal treatises which speak of The Law. Criminal Law will have come to occupy a central role in the new constellation, in as much as criminal law may be taken as a limit case which most forcefully dramatises the Kantian revolution. It is thus not surprising that modern jurisprudence will have buried the centrality of criminal law - by assigning it to a periphery realm of its own. For a criminal law book which explicitly subjects criminal law to a modernist *philosophy*, see C. Clarkson and H. Keating (1984) Criminal Law: Text and Materials.

⁶ G. Deleuze (1991) op.cit. p.83. See also J. Lacan (1989) "Kant with Sade" October, vol.51, pp.55-104.

that their actions in inflicting injuries were criminal and the sentences upon them therefore should be comparatively lenient. In future, however, that argument will not be open to a defendant in circumstances such as these." (B 560). Whereas in the Platonic metaphysic, the laws functioned by making known the Good; as formal law, the law operates without making itself known. Kant therefore institutes a diremption between the law and the laws. And this diremption short-circuits any attempt to know the law - either by reference to legal rules or to the consequences of legal obedience and disobedience. If legality cannot be derived or deduced from the rules, then a recitation of the manifold judicial and statutory statements of the laws cannot determine any particular decision. Thus, in R v Brown, Lord Lane treats us to a summary listing of the judicial pronouncements on the role of consent in the crime of assault, the conclusion of which is that the consent must be within good reason. But this does not provide him with his decision in this particular case, because in order to make his decision he must be able to spell out what constitutes the good of reason. And yet for the law to state its content would be to contradict itself. Legitimacy inheres in the form of law not its content. Thus, Lane is brought to a halt at the end of his recitation and admits the non-necessity of saying "what may be 'good reason'" (B 559). Faced with this abyss between the rules and the decision, Lane simply asserts that the satisfaction of sado-masochistic libido is not within good reason.

This then is the Kantian overturning of the first axis of the Platonic metaphysic. It is not the good which provides the ultimate ground of the laws, but rather legality - and a legality that is unknown and unknowable. Our attention to law thus careens between form and content - in which to

state the form is to render the content impossible, and to state the content is to contradict the appeal to formal validity.

The second axis of the Platonic metaphysic does not fare much better at the hands of modernity. If the Good of law remains elusive, then so too the consequences of obeying legal decisions will not be a knowledge of legality. Guilt and punishment can tell us as little about what legality is as the legal rules can. Hence, the appeal to the sanction which the numerous books of criminal law make in order to establish the distinctiveness of criminal law are beside the point. The sanction cannot reveal the legality of criminal justice. The legality of law is irrevocably concealed. Decisions are made but these are not subordinated to the general form of legality. Rather, one is guilty in advance and the punishment is specific. In the modern metaphysic, all that is left is the indeterminacy of law and the extreme specificity of the punishment. As Kafka dramatises in his story of the penal colony, the indeterminacy and the specificity are bound together⁷. The sanction is addressed only to you, is tailor-made for the condemned, and the point at which the condemned knows what the punishment is, that the point at which you die⁸. In the terms of R v Brown, the appellants are unaware of the criminality of their actions and their sentence is specific to them: "We take the view that the function of the court is to mark its disapproval

7 F. Kafka (1983) "In the Penal Colony", in Stories 1904-1924 pp. 147-89. Cf J. Derrida (1990) "Force of Law: 'The Mystical Foundation of Authority'" Cardozo Law Review, vol.11 pp.919-1046; *idem* (1985) "Prejuge: Devant la loi", in La faculté de juger. An abridged english translation of the latter is given in A. Udoff (ed) (1987) Kafka and the Contemporary Critical Performance, pp. 128-49.

8 Cf. G. Orwell's comparable account of the specificity of punishment in Nineteen Eighty Four and room 101.

of these activities by imposing short terms of immediate imprisonment."
(B 560)

After Kant, the ethical becomes a matter of the legal but a legality which is veiled. Legality - which is to say, the ethical - becomes an enigma suspended between formalism and consequentialism. A recent version of this suspended animation in the field of sexual ethics is to be read in Seidman's recent book on sexual ethics in contemporary North America⁹. Sexual ethics are described as divided between a romanticism and a libertarianism. Throughout, the claims of the one are pitted against the claims of the other in a performance of what Seidman calls a contribution to the "ongoing conversation" of sexual ethics¹⁰. He then argues that a postmodern pluralist pragmatism which is anti-foundational can provide a recipe of and for contemporary sexual ethics. It is in this vein that Seidman proposes "that the concept of responsibility might be able to provide further moral guidelines while respecting sexual diversity". Spelling out what this concept entails, he first notes its formalism: "[i]t is, like the idea of consent, a strictly formal, relational concept". As such, it has the capability "to limit choice and to serve as a useful guide to sexual decision making and social regulation". As a formal concept however, it is "a rather slippery one", and so he adds in a consequentialist account: "Acts or practices carry no intrinsic moral meaning but get their moral significance from their consequences or impact on the individual, society, and the world of natural and cultural

⁹ S. Seidman (1992) Embattled Eros: Sexual Politics and Ethics in Contemporary America.

¹⁰ S. Seidman (1992) op.cit. p.195. The premises of this performance are spelt out in the last chapter of the book, in a decidedly pragmatist vein in the tradition of Richard Rorty.

objects"¹¹. Although Seidman asserts his rejection the foundational moves of Kant, the oscillation between formalism and consequentialism *performed* throughout the book is no more than the suspended animation installed by Kant at the limit of modernity. Kant's figure for this suspended animation is the categorical imperative.

I have traced two assymetries instituted by the Kantian critique: a first in the relation between the law and its ultimate ground in the moral law; and a second in the relation between law and the consequences of obedience to law. In each instance, the assymetry arises from the aporia opened by Kant in the Platonic metaphysic of laws. Of course, Kant has a way of dealing with, of eliding the aporetic structure of law and ethics. It is the now infamous categorical imperative - namely, actions are moral if and only if I can will that the maxim, according to which I performed that action, should become a universal law. It is as such that actions can be determined as moral and non-moral. In more familiar terms, the categorical imperative installs a relation to the other that is purely formal: "Act in such a way that you treat humanity both in your own person and in the person of all others, never as a means only but always equally as an end".

What then is the specific relation to alterity demanded by the categorical imperative? The possibility of a synthetic and a priori knowledge which Kant had formulated in the first critique adverts to a knowledge which involves a relation to the outside (synthetic) and moreover a relation which is stipulated in advance (a priori). It is a

¹¹ S. Seidman (1992) *op.cit.*, pp.199-200. For the specific discussion of sado-masochism in these terms, see pp.171-4 and 115-22.

knowledge that is concerned solely with the forms of appearance, with the unchanging manner in which things must be if they are to be for us. And it is as such that the conditions of experience (Kant's "object") is the universal form of the relation to alterity. The conditions of experience are that which must be the same in the other in order for the other to appear to us. The Kantian critique is thus not a project of repressing and excluding a relation to the other but rather of controlling the ways in which that relation can and must appear. Alterity cannot be registered unless it can be inscribed as intrinsic to the ontology of the self. Henceforth, the legal system *is* the legal subject in as much as both are autopoietic. Both are self-creating and self-regulating. In this sense, the categorical imperative forbids practical reason from entering into any relation with that which is outside it. The only relation to alterity in practical reason is the barking of commands. Justice must be deaf to the demands of the other, of that which is radically other. In Lacanian terms, demand is never satisfied and it is this shortfall that is the trace of desire. As the House of Lords recently put it, justice must be prosecuted without negotiation: "'An expectation that the trial would proceed to a conclusion upon the evidence adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice. Justice can only be achieved by assisting the judge and accepting his rulings".¹²

In the domain of practical reason, the ethical relation is radically asymmetrical. However, the categorical imperative works not only to

¹² Ashmore v Corporation of Lloyds [1992] 2 All ER 486 at 493, per Lord Templeman.

institute but also to conceal its assymetrical practice¹³. This will have been the seductive function of the Kantian "type" and Lord Lane's hyphenated libido. In R v Brown, the Kantian type is the hyphen which joins the sadist and the masochist to form the autopoietic unity of the "sado-masochistic libido". What is covered over by the hyphen is the radically assymetrical attentions in which sadism and masochism obey, apprehend and perform the legality of law.

There is no doubt that the anxiety with which the legal institution solicits and responds to the activities of the "sado-masochistic group of homosexuals" is generated by the fact that sadism and masochism may be said to be subversions of the law. They both insist on the assymetry of the ethical relation. They are however two different modes of subversion. It remains then to describe each in turn.

In contemporary sexual politics, a mode of subversion described as transgression has been aligned with the Sadeian tradition¹⁴. Here, it is argued that if the legality of law is neither derived nor deduced then the suspicion is that the categorical imperative is no more and no less than an *assertion*. As Cover has remarked in the context of criminal

¹³ Cf J. Baudrillard (1987) Forget Foucault, for the double movement of institution and concealment. What Baudrillard describes as the obscenity of the social tie is simply the obscenity of the categorical imperative transferred from philosophy to the domain of the social.

¹⁴ There are numerous texts in this tradition, the locus classicus of which would be the work of Bataille. A sample of texts responding to the tradition of transgression would be: M. Foucault (1977) "A Preface To Transgression" in Language, Counter-Memory, Practice, pp. 29-52; Ferguson, F. (1991) "Sade and the Pornographic Legacy", Representations no. 36 pp. 1-21; R. Barthes (1977) Sade Fourier Loyola. For a feminist counterblast to this tradition, see A. Carter (1979) The Sadeian Woman.

sentencing, "legal interpretation takes place in a field of pain and death"¹⁵. In Brown, I have already noted how Lord Lane merely but confidently asserts that sado-masochism is without good reason. But we could also note that every one of the appellants' legal arguments are reduced to an argument about consent and then rejected with a simple "[W]e disagree ... the question of consent was immaterial" (B 559). Despite the conventional "for these reasons" with which he concludes, no reasons are given nor could be given. The Sadeian transgression thus emphasises the assertion and argues that the legality of the law is the tyranny of the mystified. The justifications of reason are the mystifications of reason. And the violence of legality is not delegated but usurped. As such, the tribunal of reason acknowledges no other. A good reason is the only reason and it is our reason. It is Reason.

The Sadeian transgression is thus a transgression of the relation between laws and the sovereignty of the moral law. It locates law as a secondary power (as in the Platonic schema), but (unlike the Platonic) as an underived power. In its positivity however, transgression is a transcendence of the law towards the sovereignty of evil. Evil is not opposed to law such that it becomes chaos, anarchy. It is neither tyrannical nor arbitrary but a regulated system of discriminations. As Deleuze remarks, the sovereignty of evil is the institutionalisation of perpetual difference¹⁶. Such a difference is traced in Sade's writings at

¹⁵ R. Cover (1986) "Violence and the Word" Yale Law Journal vol. 9, pp. 1601-29.

¹⁶ G. Deleuze (1991) op.cit. p.87. Cf. Foucault's discussion of torture as neither arbitrary nor irrational but as the regulated play of differences between the sovereign and his subjects in Discipline and Punish. Further, it may be noted that he describes genealogy as telling "the history of perpetual differences": M. Foucault (1991) "Politics and the Study of Discourse" in G. Burchell et al. (eds) The Foucault Effect, at p. 62.

the level of description¹⁷. The modality of sadistic description is the repetition of scene after scene. It is not so much the content of the scenes that thus become significant in the sadeian scenario, but the repetition. The iterable speaks for itself. The sovereignty of Evil is the sovereignty of repetition. We have only to recall Lord Lane's interminable listing of over twenty-nine counts. It is not the content of the counts but the listing which is operative. What matters is the textuality of Lane's discourse: the *repetition* of props, bodies and characters from scene to scene, count to count.

A second mode of subversion tries not so much to surpass the tyranny of law, attempts not so much to go beyond the law but rather to stay within the law and to extract the pleasures of its tyranny. In order to spell out the nature of this subversion, it is necessary to note that migration of the categorical imperative from moral philosophy to sociology, from the sovereign good to the social good.

The categorical imperative is a demand that, in the domain of practical reason, we act as *if* our wills are universal and as *if* humans are ends. In other words, the ethical and autopoietic subject of law is from the beginning a performative institution. In the domain of the social, the performative dimension of ethical action is formulated by recourse to the Kantian notion of types. In the same way that the legality of law becomes unknowable and indeterminate, so too Society becomes

17 On description in Sade, see R. Barthes (1977) op.cit. and G. Deleuze (1991) op. cit., chap. 1.

impossible¹⁸. The notion of *the type* will stand in for Society, cover over this lost Society. More positively, it specifies a new object of social ontology. Rather than a general anthropology of Man which conceives of society as a homogeneous mass, what takes place is a social anthropology of human types which conceives of the social as a heterogeneous collection of typical groups. Law is thus not so much identified with society (as implied by the metaphor of the social *contract*) but rather operates to coordinate the proper functioning of the social. In more liberal terms, what is sufficient for the good of the social is that law balances the claims of competing interest groups. It is these groups which are typical. And the individual is defined by his membership in the group. The ethical action of the individual thus proceeds from conformity to the law of his group, conformity to its conditions of experience. The way is thus open for the suspicion that the categorical imperative as type requires the individual to possess a set of character traits in order to be - and to be within the law. Hence, the libido which underwrites the sado-masochist. Hence, the emergence of the homosexual is the emergence of a pathological type. In order to be recognised in law one must live up to the typical image of homosexuality created by the legal institution. The homosexual-in-law is one who acts as *if* he is a homosexual.

¹⁸ See E. Laclau (1983) "The Impossibility of Society", Canadian Journal of Political and Social Theory, vol.7, nos 1-2 pp. 21-4. Against the essentialist vision of founding totality operating as an underlying principle of social order and which presents itself as an intelligible object of knowledge, Laclau notes at p.22 that "we tend nowadays to accept the *infinitude of the social*, that is, the fact that any structural system is limited, that it is always surrounded by an 'excess of meaning' which it is unable to master and that, consequently, 'society' as a unitary and intelligible object which grounds its own partial processes is impossible." What I go on to remark is a transformation internal to this impossibility: the move from society to the social.

In the Kantian terms of Brown's case, the sado-masochist is a synthetic and a priori unity of legal reason. He is guilty because he acts according to type, because he is in character for the legal drama of calculation. Paradoxically, as an a priori category, he is guilty *in advance*, before the fact of any act¹⁹. The law indemnifies certain acts as typically belonging to particular categories. It takes out an insurance policy against its own creations. It is at this performative level that the masochist's subversion operates: he wants to cash in the law's insurance policy.

The figure of the masochist reminds the law that its system of calculation is *from the start* a performative institution. It provokes that which the tribunal of reason conceals from itself: namely, that the obedience demanded by the categorical imperative is obedience to the dictates of simulation. The masochist insists on the spectacular nature of law - a "nature" which is not secondary but primary. In analytic terms, men act as *if* the penis is a phallus, as if legal rules are the law. Legality, like the phallus, is a fraud. As Rose puts it, "the subject has to recognise that there is desire, or lack in the place of the Other, that there is no ultimate place of certainty or truth and that the status of the phallus is a

¹⁹ As Kant styles it, the thought of the *in advance* is the modern thought *par excellence* and it is the thought of the *a priori*. To be guilty in advance is the inescapable conclusion of many legal textbooks. No doubt at the constative level of their discourse, they insist that one is innocent until proven guilty. But at the performative level, the discussion is structured so as to indicate under what conditions the accused will *not* be guilty. It is such a structure that accounts for the overriding importance of defences in criminal law which generally take the form not of "you are guilty *but* you have an excuse" but rather of "you are guilty *and* you have an excuse". Defences do not erase a prior guilt.

fraud"²⁰. In other words, what the masochistic attitude insists is that the Law is rendered precarious in as much as the subject's entry into the Law necessarily requires an exposure of the value of the Phallus. But masochism does not so much deflate or debunk the myth of phallocentric law but rather plays it to the hilt. It takes the law at its word; it provides a literal demonstration (*evidentia*) of legality as the apotheosis of camp²¹. The performative aspect of legality thus becomes the trace of a forgotten legal desire. From the point of view of the masochist, the tribunal of reason is a desiring machine which, in asserting itself, denies that same pleasure to its others, to its outlaws. The masochist thus plugs in to the desire of law; it imitates the law so as to share in its pleasures²². In more mundane terms, the masochist knows all-too-well the apocryphal but well-documented story of the judge who would don the black cap of the death sentence and then ejaculate.

Masochism is the phantasm of mimicry. It is mimicry as long as this term is redirected towards a reality without reference, a reality with desire. Its attitude to the law is not a slavish adherence to the law. The literalism of masochism is not without its disdain for legality - and it is this disdain which constitutes its subversion. Unlike the Sadeian

²⁰ J. Rose (1982) "Introduction - II" in J. Mitchell and J. Rose (eds) Feminine Sexuality, p. 40.

²¹ See the sartorial insignia of legality illustrated in Lord Chancellor's Department (1992) Court Dress: A Consultation Paper. On the ethical address of sartorial elegance and sexual difference, see J. Flugel (1950) The Psychology of Clothes, chs. 7 and 13.

²² The subversion of the masochist operates with a notion of power as resistance. As with Foucault, resistance is an electrical metaphor: neither positive nor negative. See M. Foucault (1981) op. cit. pp.95-6.

transgression which addresses itself to the aporia between legal rules and the sovereign good, the masochistic mode of subversion is to reduce the law to its consequences. Whereas the technology of sadism requires one to constitute yourself by living *up* to your legal image (of evil personified), the technology of masochism requires you to constitute yourself by living *down* to your legal image. The masochist is a creative reductionist. Punishment is neither retrospective nor prospective: whipping is not a punishment for having an erection; stinging nettles are not applied to the testicles in order to prevent an erection. In other words, punishment is not a matter of rational calculation. But rather a literal necessity. Punishment guarantees erection. It is thus that the masochist takes the law at its word - or more correctly, is taken by the word of the law. In being taken, in being guilty in advance, the masochist participates in the pleasure of law. The refractory lesson of the masochist is that obedience to the law makes you guilty. And it is this refraction which the legal institution sees when it looks at the videotapes. What it sees refracted in the whips, the branding wire, the hot wax, the nails, the pins, the fish hooks is a vivid image (*hypotyposis*) of the law's absurdity.

Faced with such refractory obedience, it is perhaps no surprise that the judgement in R v Brown should condemn the masochist rather than the sadist. No doubt, the "sado-masochist" is one figure of intersubjectivity for the legal judgement²³. But in his description of the

²³ The other figure of intersubjectivity (consent) is to be found in the references to "manly sports". The judgement attempts to distinguish in Aristotelian fashion between manly sports and sado-masochism. For the former consent is a defence to a charge of assault where the assault is part of the rules of the game. Which is probably the best description of ritual play in masochism.

facts as well as in his legal argumentation, Lord Lane in-all-seriousness focuses on the masochist. And this because the disdain of the masochist, in symbolic terms, expels the paternal value of the Law. Good reason is rendered inoperable by the masochist. The Law must be defended, restored: "We take the view that the function of the court is to mark its disapproval of these activities by imposing short terms of immediate imprisonment." (B 560) All that remains of the event which is given such cursory treatment in R v Brown is a *mark* of disapproval. What remains unremarked in such seriousness is not only the deadly irony of a sentence whose only function is to display itself but also the comic body of legal institution...

Laughter can never be heard in Court. The case report of R v Brown and other appeals has allowed us to begin a reading of legal reason. In the remainder of the chapter, the discussion turns to the political reason of homosexual law. First, a series of problems will be posed in the liberal narrative of the homosexual-in-law and its demand for legal reform. Second, the problems thus posed will be addressed in terms of the symptomatology of the legal institution and the performative dimension of gay politics. At the end, once more I will thus have arrived at the *as if* of the categorical imperative to note "the explosion of man's face in laughter, and the return of masks."²⁴

²⁴ M. Foucault (1974) The Order of Things, p. 385: "Rather than the death of God - or, rather, in the wake of that death and in a profound correlation with it - what Nietzsche's thought heralds is the end of his murderer; it is the explosion of man's face in laughter, and the return of masks; ... in our day, the fact that philosophy is still - and again - in the process of coming to an end, and the fact that in it perhaps, though even more outside and against it, in literature as well as in formal reflection, the question of language is being posed, prove no doubt that man is in the process of disappearing." In other words, what I have styled as the masochistic attention to the law of the law is the expulsion of the

Forbidden Fruits: A Preface to Betrayal

As Jean Genet understood, to be beloved is to be betrayed²⁵. And there is no doubt that the homosexual is a subject beloved by law. Here, in the musty domain of the legal institution, we will find a language that speaks imperiously, imperatively, of buggery, sodomy and gross indecency. We will also hear of children endangered by paedophiles; of policemen, who just happen to be passing, offended by men in cottages; of judges dressed in full-bottomed wigs and silky thin stockings, draped in ermine and black gowns, who imagine themselves addressing a world overrun by catamites; of insult likely to cause a breach of the peace; of a rampant promiscuity and an ever-present seduction; of soliciting and importuning everyman. In this noisy and nauseous catechism, the law will have interrogated the amorous relations of men not for *marks* of disapproval but for hall-marks of a sexuality that insists on expressing itself in a wayward manner. What is the meaning of homosexuality? In dark and sombre tones, the law of liberalism will have repeatedly solicited homosexuality to show itself: "Are you a homosexual?" will have repeatedly echoed down the long corridors of law²⁶. As

paternal contract and the return of a ritual that speaks of nothing but itself.

25 The most relevant text here is J. Genet (1967) A Thief's Journal. But see also his posthumous Prisoner of Love. And the reading of the law of criminal sexuality through Genet and Hegel in J. Derrida (1986) Glas.

26 The permissibility of this question is discussed in R v Horwood [1969] 3 All ER 1156 [the question being asked by the police]; R v King [1967] 1 All ER 379 [the question being asked in cross-examination], at p. 381-2: "It is no different to put to a man the question, 'Are you a homosexual?', than to put to him certain indecent photographs of a homosexual nature found in his possession and say to him: 'Are these yours?'" ; R v Church and Another, Court of Appeal (Criminal Division) reported on Lexis [the question being asked in cross-examination].

Baudrillard has remarked, "[s]ex is produced as one produces a document, or as an actor is said to appear (*se produire*) on stage. To produce is to force what belongs to another order (that of secrecy and seduction) to materialize". The enterprise of production is "to render visible, to cause to appear and be made to appear... to set everything up in clear view, whether it be an object, a number, a concept. Let everything be produced, be read, become real, visible, and marked with the sign of effectiveness.... Ours is a culture of "monstration" and demonstration, of "productive" monstrosity"²⁷. Are you a homosexual? is a question that commands: show yourself, your true colours. The question can only be answered by a display of monstrosity. It posits a legal subject who can only say "Here I am and here I am to be judged". To say "I am" is always already to posit oneself as an object of (legal) judgement²⁸. In this, gay men will have been the subject of and subjected to the law's own brand of love. My interest is thus with the betrayals which define the love of the law for the homosexual.

Since we have recently "celebrated" its twenty fifth anniversary, my exemplary instance will be the Sexual Offences Act 1967. Although for some this statute is history, it is a history which insists on coming

²⁷ J. Baudrillard (1987) *op.cit.* pp.21-2. Baudrillard is here counterposing seduction as an internal limit to production. For his elaboration of seduction, see J. Baudrillard (1990) *Seduction*.

²⁸ This linkage between confession and judgement is reduced in the cases to the level of logic. See *R v King* [1967] 1 All ER 379 at 382, followed and repeated in *R v Horwood* [1969] 3 All ER 1156 at 1159: "the expression "I am a homosexual" does not *necessarily* convey that the accused has committed homosexual offences" (per O'Connor J, *italics added*). This is however only an "assumption" of the legal institution - and as such, leaves open the possibility that to admit to homosexuality is to admit to one's guilt. An admission is always already an admission of guilt. It is in this sense, that to say *I am* is to posit oneself as an object of judgement.

between the lines - not to say the statutory sheets - of homosexual law reform. It defines the terms and conditions of reform. And it is a statute which defines a history of the homosexual-in-law²⁹. As such, a reading of this Act becomes important for the way in which the contemporary objectives, strategies, and interventions can be (re)formulated.

If you will, let me begin with a story of beauty. It is the formalist and positivist apologia that cannot help itself asserting that the law is as it should be. Law, we are told, is primarily a code of conduct. It is a code that not only states what the law is but which informs us as to what we should and should not do - not unlike the etiquette manuals of Debrett and Barbara Cartland. Except that the authors of the legal code are Parliament and the not-so-common judges of the common law. As an informational code, the validity of which depends on its message being communicated, the code must represent the law in a coherent and sensible manner. The representation must thus erase all trace of prejudice, of judicial bias, of the person of the judge. Moreover, the authority of these authors resides in their ability to back up their commands by sanctions - sanctions instituted by judges but performed by others such as the institutions of police and prison. In short, the jewel

²⁹ As I will argue, it is a particular stylisation of history that the 1967 Act uses. However, for the moment, it is interesting to note that "history" has been a repeated tool of legal reform in this field. Thus, the rhetorical organisation of Coke's reading of the 1533 Act which created the secular offence of "buggery, or sodomy" is organised around a historical detour: it begins by asserting the secular jurisdiction over buggery; it then moves to a historical digression on the philological and sociological origins of the law; only then does it set out the criteria for determining liability; and then concludes with a return to and repetition of the secular jurisdiction. To a certain extent, the rhetorical organisation of my reading of the 1967 Act mimics or plays with Coke's fourfold division. See E. Coke (1979, rep. of 1628 edn) The Institutes of the Laws of England, 3rd Part, chap.10.

in the crown of English Law is that it is a system of valuable rules, the purpose of which is to forbid and prohibit particular behaviours. And to do so with a considerable degree of force.

Taken-for-granted, this story takes us for a ride and the ride of our life. This is never more so than when the talk gets around to homosexual law reform. The presumption - and rightly so - is that the law needs to be reformed. But it also presumes that the law which needs to be reformed is a set of rules which forcefully prohibit certain types of conduct. Thus, reform quickly turns its attention to the litany of rules that forbid sodomy, buggery, gross indecency, soliciting, insult likely to cause a breach of the peace, and many more besides that discriminate against homosexuals³⁰. Taken together, these particular rules are framed as if they amount to a general prohibition of the homosexual subject. Hence, the aim of legal reform is to remove this general prohibition. And, more importantly, the way in which this removal will be achieved is by abolishing (one by one, or all at once) each particular rule (of buggery, gross indecency, the age of consent, and so on). The problem of reform then becomes a matter of changing the formal rules of law. It would be a matter of lobbying Parliament to declare that homosexuality is *no longer* illegal, *no longer* criminal. Of course, there will be problems in making sure that the declaration is carried out by the various legal institutions. But that is simply a pragmatic setback - the primary task that confronts homosexual law reform is to change the rules. In brief, there are rules; these rules discriminate between heterosexuals and homosexuals; the

³⁰ For a useful if somewhat dated mapping of the legal rules and their consequences, see P. Crane (n.d.) Gays and the Law.

rules need to be changed; and the aim of the change is to eliminate the discrimination.

It is in these terms that the story of the Sexual Offences Act 1967 has been told. That story is one of decriminalisation. As a statute that would change the criminal legal rules which prohibited homosexuality, the reform functions to remove the homosexual from the ambit of criminal law. This is the accepted story leading up to the actual passing of the 1967 Act. It is also the story that provides the language for subsequent criticism of the Act. Since the passing of the statute, the dominant criticism has been that it did not go far enough along the path of decriminalisation. And so once more into the breach, in an attempt to remove all the rules that restrict the right to be a homosexual (in recent years, the lowering of the age of consent, in order to equalise it with that of heterosexuals, has been high on the agenda). In short, decriminalisation is the story of the 1967 Act both as a reforming statute and as a statute that needs to be reformed³¹. But what if, rather than decriminalising homosexuality, the 1967 Act criminalised homosexuality? What effect would this have on the story of homosexual law reform? Could the success of the 1967 reform then be reconstructed, rather than its failure? And more polemically, would such a reconstruction throw up a complicity between homosexual law reform

³¹ A recent and exemplary account of the history of homosexual law reform which conforms to this model is S. Jeffery-Poulter (1991) Peers, Queers and Commons. In campaigning terms, the model represents the position of the Campaign for Homosexual Equality. In personal terms, the strength of this model of reform, its hold on our imagination, was brought home to me when I discovered that in previous drafts of this chapter I had persisted in citing the 1967 Act as the Sexual Offences (*Amendment*) Act.

and the betrayal of the homosexual? It is to these questions that a rigorous reading of the 1967 Act would have to be addressed.

Section 1 of the 1967 Act states that a "homosexual act in private shall *not* be a criminal offence". Of course, there were numerous conditions that had to be met before you could take advantage of the decriminalisation. I thus begin by noting the formal conditions of the legal love of the homosexual.

A first condition is that both participants must be males. Ironically, female-male buggery remains a crime and its sentencing remains unaffected by the 1967 Act. In this respect, the law constructs cross-sex buggery as involving a male protagonist and a female victim. And in such situations, consent is declared irrelevant for legal responsibility³². In terms of sentencing, the fracturing of the crime of buggery into gradations of seriousness instigated by R v Courtie in respect of homosexual buggery has been declared inapplicable to heterosexual buggery³³. And finally, bestiality remains constitutive of buggery whether it is committed by men or women.

A second condition is that of age. Both males must be at least twenty-one years old. If you are under twenty-one, then if either one of the participants is under twenty-one, both become liable to prosecution.

³² The most recent case is R v Young [1990] Crim LR 752 where the victim was a 19 year old female. Consent is excluded from consideration in male-female buggery because it is framed as by definition authoritative - or, on analogy with R v Brown [1992] discussed above, sado-masochistic. See also R v Harris (1971) 55 Cr App R 290.

³³ R v Young [1990] Crim LR 752. And R v Courtie [1984] 1 All ER 740-7.

This is the age of consent and is simply a formal lack of capacity in the under-21. However, in order to prosecute the under-21 for either gross indecency or buggery, the consent of the Director of Public Prosecutions is necessary³⁴. It should perhaps also be noted that this exemption provides the formal conditions for the repeated pressurising by police of the under-21 to name those over-21 with the inducement that the DPP will not prosecute. A related but more general condition is that of consent. Both males, being over the age limit, must consent to the sodomitical or indecent act. In this respect, consent operates as the formal designation of the legal subject as autonomous and self-governing, as responsible³⁵.

A fourth condition is that of the *locus in quo*. Both men, being over the age limit and having consented, must conduct their business in private. As the now infamous phrase of the Wolfenden report puts it, what goes on in private is "not the law's business". The domain of the private has several characteristics: it is a realm of moral judgement; it is a cohesive and closed domain that stands over and against the law which is also a cohesive and closed domain; it is a domain that is not public³⁶. And more specifically, the private is a social space - a place restricted to where two but no more than two men get together behind

³⁴ Cf. Assistant Recorder of Kingston-upon-Hull, ex parte Morgan [1969] 1 All ER 416 where the consent of the DPP was not required on a charge of *incitement* to commit the crime.

³⁵ See R v Brown [1992], and discussion above.

³⁶ On the non-coincidence of these various senses of the private, see B. Brown (1980) "Private Faces in Public Places", Ideology and Consciousness, no.7 pp.3-16; A. Kuhn (1984) "Public versus private: the case of indecency and obscenity", Leisure Studies, no. 3 pp. 53-65; and S. Watney (1987) Policing Desire, pp.59-61, 64-6.

closed doors in the name of homosexuality. In the language of the 1967 Act, privacy is excluded where more than two men "take part or are present" or where the place is a public lavatory³⁷.

These then are the positive conditions which exempt homosexual acts from culpability - yet which, in doing so, inscribe a culpable object. There are however some formal negative conditions. You must not be on a merchant ship of the United Kingdom. You must not be a member of the armed forces. You must not be suffering from a severe abnormality³⁸. And finally, there is a further restriction on the sphere of the private conceived as a geographical space, in that you must not be on the Isle of Man and, until recently, in Scotland or Northern Ireland. Having met this panoply of positive and negative conditions, then, the 1967 Act declares that you *shall* not be charged with having committed a crime if you perform "homosexual acts".

37 Sexual Offences Act 1967, section 1(2). For judicial consideration of the operation of the private and public in this section, see R v Reakes [1974] Crim LR 615. This case concerned the crime of buggery, and was applied in R v Church and Another, reported on Lexis, in respect of gross indecency. There are also the numerous cases of gross indecency which write of "display" and "exhibition", thus conjuring up a third person. And then are the numerous public order offences which operate a private-public distinction. Most recently, see Cheeseman v DPP [1991] 2 WLR 1105. In this case, a prosecution was brought under the Vagrancy Act of 1824 and addressed two bizarre issues - one, whether a toilet could be classified as a "public street", and two, whether a policeman spying on toilets could be deemed to be a "passenger".

38 For the military exclusions, see the Sexual Offences Act 1967 section 1(5) retaining the prohibitions in the Army Act 1955 section 66, the Air Force Act 1955, and the Naval Discipline Act 1957 section 37. For judicial consideration of the latter and gross indecency, see R v Warn [1968] 1 All ER 339 (Courts Martial Appeal Court), and the appeal to the House of Lords reported in [1968] 2 All ER 300. On severe abnormality, see Sexual Offences Act section 1 (3-4), and the case of R v Robbins [1988] Crim LR 752.

The phrase "homosexual acts" summons up, by virtue of section 1 (7) of the Sexual Offences Act 1967, two particular legal infractions - buggery and gross indecency. These crimes are legislated by virtue of sections 12 and 13 respectively of the Sexual Offences Act 1956. The usual terminology is to say that these sections are *now* "subject to" section 1 of the Sexual Offences Act 1967. What should thus be remarked upon is that the 1967 Act has, as its *sine qua non*, a history of the homosexual-in-law. The statute presumes a history of rules that prohibit homosexuality as such. The narrative of the 1967 Act may be summarised as: *homosexual acts have been but will not be crimes*.

This narrative is widely accepted. But first, let us note that it is conventional that when a statute is changing the legal rules, the word amendment is inserted in its title. Curiously, the 1967 Act is not called the Sexual Offences (Amendment) Act. It is however taken as a reforming statute. I have already remarked my own insistence on citing the Act as the Sexual Offences (Amendment) Act, and it is an insistence which the Act forces. The self-description under the title is "An Act to amend the law of England and Wales relating to Homosexual Acts". As an amendment, the Act thus summons up a history. But the history can also be read in the Act's grammar of tenses: section 1(1) of the Act states that homosexual acts in private "shall not" be an offence - *as if* they had been an offence. The *as if* of the Act is made explicit more generally when it is conventionally stated that after 1967, the criminal law *no longer* prohibits homosexuality - albeit partially. Thus Wolfenden, in his autobiography, describes the proposal of his Departmental Committee in the following terms: "'we proposed, quite simply, that homosexual behaviour between consenting adults in private be no

longer a criminal offence"³⁹. Thus, the Wolfenden Report makes the following assertion: "We recognise that a proposal to change a law which has operated for many years so as to make legally permissible acts which were formerly unlawful, is open to criticisms which might not be made in relation to a proposal to omit, from a code of laws being formulated *de novo*, any provision making these acts illegal. To reverse a long-standing tradition is a serious matter and not to be taken lightly. But the task entrusted to us, as we conceive it, is to state what we regard as a just and equitable law. We therefore do not think it appropriate that consideration of this question should be unduly influenced by a regard for the present law, much of which derives from traditions whose origins are obscure." Having placed the law in an immemorial past - and thus a past which exists but that does not matter - the way is open to rewrite its history in the very act of summoning up a future law. From thence, the language of a law that is *no longer* will be formulated: "We accordingly recommend that homosexual behaviour between consenting adults in private should no longer be a criminal offence"⁴⁰. Similarly, Smith and Hogan's criminal law textbook reiterate the narrative of the Wolfenden Report in identical terms: "a homosexual act between adult males in private is no longer an offence"⁴¹. In brief, a narrative of reform entails an historical story. The aim in the next section is to describe that which preceded the 1967 Act in order to pose a

³⁹ J. Wolfenden (1976) Turning Points: the memoirs of Lord Wolfenden, p. 139 and, more generally, chap. 8.

⁴⁰ Home Office (1957) Report of the Committee on Homosexual Offences and Prostitution, Cmnd. 247, paragraphs 60 and 62. This report will no longer be referred to by its formal title but rather by its colloquial title, namely - the Wolfenden Report.

⁴¹ J. Smith and B. Hogan (1992) Criminal Law, 7th edn, p. 478.

different history of the homosexual-in-law and thus a different story of reform. The argument will have been that, *pace* the Wolfenden Report, the 1967 Act proposed a code of laws *de novo*.

As If: the cons and fusions of history⁴²

Where previously the history was told of traditions and invention, of the old and the new, of the dead and the living, of the closed and the open, of the static and the dynamic, I would set out to tell the history of perpetual differences; more precisely, to tell the history of ideas as a set of specified and descriptive forms of non-identity.⁴³

⁴² The social history of male homosexuality has been the subject of quite extensive study. For a useful conspectus of the approaches and the development of an anti-essentialist social history, see J. Weeks (1991) *Against Nature*, chap. 2. In this section, however, my concern is not to do a history but to use history to pose a problem in and for the contemporary legal apparatus of homosexuality. The detailed accounts of the history which I have found most helpful are: J. Weeks (1989) *Sex, Politics and Society*, 2nd edn, esp. ch. 6; *idem* (1977) *Coming Out*, esp. part 4; *idem* (1985) *Sexuality and Its Discontents*, esp. part 2; A. Bray (1982) *Homosexuality in Renaissance England*, esp. pp. 13-32; M. Goodich (1979) *The Unmentionable Vice*, esp. chap. 1 on the middle ages; D. Halperin (1990) *One Hundred Years of Homosexuality*; Greenberg; M. Foucault (1981) *op.cit.*; A. Davidson (1987) "Sex and the Emergence of Sexuality", *Critical Inquiry* no.14 pp.16-48. Extended considerations of the legal history are rarer. In this respect I have had the benefit of Leslie Moran's conversation, in addition to his published work. See L. Moran (forthcoming) "Of Buggery and Its Neologism", *New Formations*; *idem* (1989) "Sexual Fix, Sexual Surveillance: homosexual in law", in S. Shepherd and M. Wallis (eds) *Coming On Strong*; *idem* (1991) "The Uses of Homosexuality" *International Journal of the Sociology of Law*, vol. 19 pp. 149-60; *idem* (forthcoming) *The Homosexuality of Justice*. There is also the excellent article by E. Cohen (1989) "Legislating the Norm: from sodomy to gross indecency" *South Atlantic Quarterly* vol. 88 no. 1 pp. 181-217. Other texts that I have found useful are: A. Goldstein (1988) "History, Homosexuality and Political Values" *Yale Law Journal* vol.97 pp. 1073-1110; F. Lafitte (1958) "Homosexuality and the Law" *British Journal of Delinquency* no.9 pp.8-19; S. Licata and R. Petersen (eds) *The Gay Past*; and S. Jeffery-Poulter (1991) *op.cit.* For the phenomenology of homosexuality between 1885 and 1967, see K. Porter and J. Weeks (1990) *Between the Acts*.

⁴³ M. Foucault (1991) "Politics and the Study of Discourse", in G. Burchell et al. (eds) *op.cit.* p. 62.

Prior to 1967, "buggery" (or "sodomy") and "gross indecency" had been the formal legal infractions. In the ecclesiastical codes, buggery was an infraction on a par with heresy, sorcery, and atheism. Thus, the Fleta of the early fourteenth century details the punishment of Jews in the same breath as the punishment of bestiality and sodomy: "those who have connection with Jews and Jewesses or are guilty of bestiality or sodomy shall be buried alive in the ground"⁴⁴. Similarly, "the inquiries of the Holy Church shall make their inquests [i.e. investigation and punishment] of sorcerers, sodomites, renegades and misbelievers"⁴⁵. What is listed here are categories of unbelief - aberrations of religious belief, or what amounts to the same thing, the absence of belief. And it is as such that buggery or sodomy becomes an ecclesiastical crime: buggery is no more and no less than an act which offends the divinity⁴⁶. Moreover, the act which offends God can be performed by men with men, by men with women, by women with men, and by humans with animals. Its only exclusion is that it cannot be performed by women with

⁴⁴ Selden Society (1955, 1972, 1884), The Fleta, Books I-VI (ed. and trans. by G. Sayles). Originally published circa 1300. J. F. Stephen's history of criminal law has a cursory discussion of buggery but refrains from mentioning the crime. In the present context, he remarks that "It is true that the Fleta, Britton and the Mirror mention the offence, the first mentioning burying alive, the other two burning, as the punishment." and concludes that until 1533 "the offence was till then merely ecclesiastical". See J.F. Stephen (1883) A History of the Criminal Law of England, Volume 2 pp.429-30.

⁴⁵ Quoted in P. Crane (n.d.) *op.cit.* p.11, from L. Crompton (1978) "Gay Genocide From Leviticus To Hitler", The Gay Almanac.

⁴⁶ This association remains a resource in the contemporary legal apparatus. And was specifically useful in the now infamous prosecution of Gay Times. In formal terms, buggery or sodomy is repeatedly aligned with the various forms of libel - seditious, blasphemous and obscene. In the context of HIV and AIDS, the Chief Constable of Manchester received telegraphic communications from God telling him that AIDS was the punishment of God for the offence against him represented by the abhorrent practices of homosexuality.

women. In the sixteenth century, criminal legal practices are becoming secular, and so too does the crime of sodomy. The turning point can be registered in the 1533 statute of Henry VIII⁴⁷. The transition from the ecclesiastical jurisdiction to the secular jurisdiction is however fraught with difficulties and is never quite secured except, if at all, by assertion of the Renaissance inventors of an English Common Law⁴⁸. As a secular offence, the crime does however remain concerned with acts, and with acts performed by men (with the same and opposite sex), or by women (with the opposite sex), or by humans (with animals). According to the third part of Coke's Institutes (in chapter 10 called "Of Buggery, or Sodomy"), "buggery is a detestable, and abominable sin, amongst Christians not to be named, committed by carnall knowledge against the ordinance of the Creator, and order of nature, by mankind with mankind, or with brute beast, or by womankind with brute beast"⁴⁹. The authority

⁴⁷ Buggery becomes part of the secular calendar of crimes with the statute of Henry VIII, (1533-4) 25. H. 8, c.6. This Act of the Reformation Parliament was to lapse at the end of the next Parliament. It was temporarily renewed in 1536 and 1539; it was made perpetual in 1540 and modified in 1548 by an Act forbidding indictments brought more than six months after the alleged offences took place and abandoning the penalties of confiscation of property and corruption of blood as additional to execution. In 1553, all felonies created since the reign of Henry VIII were abolished - including buggery. However, in 1563, the 1533 Act was reenacted in its entirety and in perpetuity - the Parliament of the time declaring that since its repeal in 1553 "divers evil disposed Persons have been more bold to commit the said most horrible and detestable Vice of Buggery" [(1562-3) 5 Eliz. I c. 17]. In formal terms, the Act has remained on the books ever since - first being consolidated in the 1828 Offences Against the Person Act, then in the 1861 Offences Against the Person Act (abolishing the death penalty for buggery). And finally being incorporated in its current place: the Sexual Offences Act of 1956.

⁴⁸ I am thinking of Sir E. Coke's reinterpretation of the 1533 Act. See E. Coke (1979) op. cit.. For detailed readings of Coke, see L. Moran (forthcoming) "Of Buggery and Its Neologism" op.cit., and E. Cohen (1989) op.cit. pp.

⁴⁹ E. Coke (1979) op.cit. p.58.

for this prohibition is asserted at the beginning of the chapter as being derived from Parliament but, as this quotation makes clear, the secularisation of sodomy is heaped on top of sodomy as an ecclesiastical offence. Such secularisation, while not doing away with the "sin", changes the object to be punished. Buggery, or sodomy, now appears as a breach of and in the natural order. As the Lord Steward's exhortation in the 1631 trial of Lord Audley for rape of his wife and buggery with a man amongst other offences, puts it: "Oh think upon your offences! Which are so heinous and so horrible, that a Christian man ought scarce to name them, and such as the depraved nature of man (which of itself carries a man to all sin) abhorreth! And you have not only offended against nature, but the rage of a man's jealousy!"⁵⁰. Once an offence against God, now it is also an offence against nature. Sodomy is an "unnatural offence". With this re-categorisation, we begin to approach the modern lexicon of the homosexual-in-law, at least and in as much as the notion of "unnatural offence" becomes a resource for contemporary codifications of the homosexual. In a powerful apology for the reiteration of this tradition, Smith and Hogan discuss the criminal legal constellation of buggery and gross indecency under the section heading of "'Unnatural' Offences". The scare quotes around unnatural allow them to have it both ways, and in a footnote they explain by way of a formalist defence: "some may regard this term as offensive, but it is the heading

⁵⁰ The trial of Lord Audley, State Trials pp. 402-18 at p. 415. Amongst Audley's other offences were "that he was constant to no religion, but in the morning he would be a papist and go to mass, and in the afternoon a Protestant and go to a sermon" (p.410). What is being formulated is here is a metaphysics of inconstancy - the sodomite is not only inconstant in his beliefs, but also he or she is not constant to nature. With such a metaphysics, we confront the discursive rigidity of the legal institution as it places the homosexual as inconstant: he is promiscuous; his practices are various; he is not what he seems; he is a pervert; ad infinitum.

in the Act"⁵¹. Thus also in section 44 of the Sexual Offences Act 1956 the term "unnatural sexual intercourse" has been declared to mean buggery, the act of buggery being defined as "penetration of the back passage of a human being by the male organ."⁵² By the beginning of the nineteenth century, what was legally unnatural about buggery had been reduced to anal intercourse⁵³.

What I have been noting is a discursive transformation from buggery as an offence against religious order to buggery as an offence against natural order. This metamorphosis is installed most prominently in the seventeenth century. However, such strategies are displaced by still further metamorphoses.

In the classical law of the eighteenth century, sodomitical acts make an appearance within a legal apparatus in which the person, the

⁵¹ J. Smith and B. Hogan (1992) Criminal Law, 7th edn p.476. It is one of the beautiful ironies of criminal law that Smith and Hogan would like to avoid being offensive at the same time that the crime of homosexual acts is formulated as a category of offensiveness. Such a strategy of displacement is one of the constitutive fantasies through which the law comes to desire.

⁵² R v O'Sullivan and Others, 27 February 1981 [Lexis Report] per O'Connor LJ, discussing whether or not a crime of *rape per anum* is a *res per judicatum*. See also the report of the same case under the name of Daniel Gaston (1981) 73 Cr App R 164-7.

⁵³ R v Jacobs (1817) Russ & Ry 331 CCR, where it was held that unnatural forms of intercourse other than per anum were not within the meaning of the term buggery. Such a reduction will put to one side the question of orality, and at the same time begin to create a space for the elaboration of a crime of gross indecency. As to which, see discussion below. It should also be noted that what is also put to one side is the inclusion of bestiality within buggery where it is not the penetration of any particular orifice which is recognised as legally problematic but rather the congress with an animal. While a series of reductions are proceeding apace, we should also note that E.H. East is still referring to buggery committed "in any manner". See E. East (1803) A Treatise of the Pleas of the Crown, Vol. 1 p. 480.

family and society are continuous. Just as Coke stands on the cusp between the Law of God and the Law of Nature, so Blackstone stands on the cusp between the Law of Sovereignty and the Law of Society⁵⁴. In as much as all crimes were crimes against the sovereign, so sodomy was *crimen lese majestatis*. As treason, sodomy is an offence against the person(s) - both literal and majestic - of the King. Blackstone's achievement is to reformulate sodomy as a crime against the person of *the individual*. But what is prohibited as sodomy are acts and not personalities⁵⁵. Sodomitical *acts* are on a par with breaches in the rules regulating the contract of marriage. And the significance of this contract is that it stands in for, is a synecdoche of, the social contract⁵⁶. The sodomitical act is a breach of promise which renders the social contract null and void. The ethical problem of the sodomite in the eighteenth

⁵⁴ See W. Blackstone (1979, orig. 1765-69) Commentaries on the Laws of England, esp. vol. IV dealing with the law of public wrongs. The text is based on a course of lectures given at Oxford University to intending lawyers. For a discussion of the formalist dimension of this text, see D. Kennedy (1979) "The Structure of Blackstone's Commentaries", Buffalo Law Review vol. 28 pp. 205-382.

⁵⁵ As this sentence indicates, if I have not already indicated, my description is within the orbit of Foucault's oft-quoted statement from the The History of Sexuality Volume 1. What is however rarely noted is that, although there is a discontinuity between the sodomite and the homosexual, the category of homosexual is invented in law on the back of the Blackstonian formula for sodomy. As such, what is judged in homosexuality is the trace of buggery.

⁵⁶ The marriage contract is primarily a question of public law, as was what is now known as criminal law. It is in this connection that Pateman has explicated the gender of the social contract as categorically patriarchal. See C. Pateman (1988) The Sexual Contract. For a critical reading of this argument, see G. Rose (1992) The Broken Middle. On the political theory of the social contract in terms of feminist debates on sexual violence which resonates with the law of sodomy in this period, see J. Vega (1988) "Coercion and Consent: Classical Liberal Concepts in Texts on Sexual Violence" International Journal of the Sociology of Law vol. 16 pp. 75-89. On the socio-legal contract generally, see A. Carty (ed) (1990) Postmodern Law, esp. the introduction; and P. Goodrich (1990) Languages of Law, chap. 5.

century is that he or she is asocial. In this, a further resource is invented - namely, that familiar story which links homosexuality to the dissolution of society⁵⁷. But in the eighteenth century it is the sodomite - and not the homosexual - who breaks the law. In this social contract, it is not the monarch who embodies the principle of sovereignty but rather the individual legal subject. The law is self-founding, self-creating, self-governing. The law is created in the consent of all individuals to its government and the legal subject is created by the law to which the subject consents. The social contract is thus a formal expression of human will, a representation of Everyman. In these terms, the sodomitical act is an infraction against the Law of Man. The sodomite is unmanly, and as such an outcast - a liminal figure cast out from the Society of Legal Man. The object of punishment will thus be the reclamation of the outcast, a reassertion of the contract, a requalification of the sodomite as socio-legal subject. In this instance, the legal apparatus punishes in order to *decriminalise*, to re-man the sodomite.

But lest we forget, the act of the sodomite is a potentiality in all of us. In Blackstone's words, sodomy is committed with "mankind or

⁵⁷ In contemporary terms, the standard-bearer of this tradition has been Lord Devlin's response to the Wolfenden Report. See P. Devlin (1959) The Enforcement of Morals. Unfortunately, this text has been subjected to the violence of a liberal misreading - first advanced in H. Hart (1968) Law, Liberty and Morality. Undoubtedly Devlin represents a conservative position and Hart a neo-liberal position. And it is as such that the Hart-Devlin debate has become definitional of the debates on sexual politics in law. Without going into the details of the debate, we should note a distinction between the sodomite as a-social and therefore an imaginative figura of social nullification, and the sodomite as *anti*-social and thus an imaginative figura of social decay. In the former, the act of the sodomite places the sodomite outside the social contract; in the latter, the homosexual act is placed within the social contract. The former is an outlaw (the contractarian and Devlin position), the latter is an in-law (the liberal and positivist position of Hart).

beast"⁵⁸. It can be committed by all and sundry because all humans possess a (free) will. In fact, the will defined what it is to be human, which is to say - what it is to be responsible according to law. It is the will that establishes the subjective right to punish. As such, all humans *could* express their will by performing sodomitical acts. The will - in the sense of aim or purpose - is a potentiality in us all. But this still leaves the problem of explaining how in any particular situation an individual does commit the act. Any particular act is explained as the result of a temporary and contemporaneous confusion of the will. As Blackstone puts it, the intentionality which expresses itself in the unnameable act is a "defect of the will"⁵⁹. The performance of sodomy thus did not commit one to a life of sodomy. In no sense could it be said that *once a sodomite, always a sodomite*. A sodomitical act is more an accident, a miscalculation of the will - always liable to be repeated but also always an isolated act that subsists quite happily and without contradiction with what we, with John Wolfenden, would *now* call "heterosexual acts"⁶⁰.

⁵⁸ W. Blackstone (1979) *op. cit.* As E. Cohen (1989) *op. cit.* has remarked the reference to "mankind" is distinctive of Blackstone - formerly it used to be spelt out as man with man and woman with man etcetera. In the terms of my argument, the linguistic change indicates that the Law of the Social Contract is the Law of Mankind i.e. humanity.

⁵⁹ W. Blackstone (1979) *op. cit.* This is the language he uses to describe the incapacity of the legal subject. It is the centrality of the will - both as potentiality and as confusion - that establishes the subjective right to punish. It also defines the necessity of the formalist enterprise - the representation of law must be clear, coherent and unified, if the will is not to be confused in the address of law. As Bentham put it, "a sensible image of the law" is one that intimidates the will of the legal subject - keeping it on the straight and narrow.

⁶⁰ J. Wolfenden (1976) *op. cit.* p.140. In fact, if anything, sodomy as a crime *included* within itself what we would now call heterosexual acts. The use of the term heterosexual however remains anachronistic in the sense that sodomy is not thought in terms of an opposition between homosexual and heterosexual.

So far then I have outlined a legal history in which the legal apparatus of (criminal) justice repeatedly designates the bugger, or sodomite, by reference to an originary law. While this might constitute the *longue duree* of sodomitical law, what is to be noted is that the semantic network of the origin is multiple and discontinuous - there is no unity between the originary references of God, Nature, Sovereign, Society, Mankind, Family. In psychoanalytic terms, these are constituted as variations of the paternal metaphor, the *nom de pere*. What I have been describing is not a substantive or formal referent of buggery or sodomy but a principle of designation. And it is this principle which constitutes the prohibition of the legal apparatus - its *non de pere*. The rigidity of the legal apparatus inheres in a principle of (ab)use. When it comes to buggery, the legal apparatus is nothing if not a catachrestic structure.

The contemporary legal history of buggery (or sodomy) culminates in the 1967 phrase of "homosexual acts". Yet there is one other strand which the phrase summons up as it legislates and reforms the law - namely, the history of the crime of gross indecency between men⁶¹. In contrast to buggery, that crime is a more recent invention of legality.

It begins late on the evening of Friday the 6th of August 1885, as the Parliamentary session is about to close for its summer recess. And it takes the form of a late addition to the Criminal Law (Amendment) Act of

⁶¹ The Wolfenden Report provides a tabular reconstruction of all the formal rules which it deems to be related to homosexual offences (*op.cit.* para. 77). While these are numerous, the 1967 Act specifically limits itself to buggery and gross indecency: section 1(7).

that year. That addition has gone up in history as the infamous Labouchere Amendment. Henry Labouchere was the founder of Truth and was largely responsible for the insertion in the Act of section 11 which made acts of gross indecency between men misdemeanours punishable by a maximum of two years' hard labour. Although he had wanted to make the maximum penalty seven years, he had been advised by the then Home Secretary and Attorney-General not to go beyond two years. When presented to Parliament, the clause specified that the penalty would be one year but, on a motion from the Government, the sentence was raised from one to two. Claiming that he took the clause *mutatis mutandis* from the French Code, Labouchere explained in a single sentence to an almost deserted House of Commons that the clause was designed to fill a gap in the law - namely, that "at present any person on whom an assault of the kind here dealt with was committed" could not be punished unless the victim was under thirteen⁶². In this respect, it should be noted that the Criminal Law (Amendment) Act 1885 is a statute whose avowed purpose was to change the law on prostitution and the female age of consent. On 6th August 1885, section 11 is passed without debate.

The section states: "Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of any act of gross indecency with another male person, shall be guilty of a misdemeanour,

⁶² Daily Debates, House of Commons, 6 August 1885, column 1397. Cf. F. Lafitte (1958) *op.cit.* p. 18. On the French connection, Lafitte notes that the claim is unfounded. For an account of the French law which renders it explicable, see the discussion of the law on *pudeur* in M. Foucault (1990) Politics, Philosophy, Culture ch. 16 esp. pp.274-80.

and being convicted thereof shall be liable at the discretion of the court to be imprisoned for any term not exceeding two years, with or without hard labour." The formal hope of filling all the gaps is registered in the grammar of the section as it tries to cover all the options - the commission of the act, being a party to the act, procuring, attempting to procure, public, private... The question that needs to be addressed then is - what will have been added by this new crime to the history of buggery?

A first difference to note is that the legal apparatus legislates acts - but this time acts *between men*. Unlike Coke's man, woman or brute, and unlike Blackstone's mankind or beast, section 11 speaks of a relation between male persons. Although this is a restriction in the proscribed participants, at the same time there is an extension of the proscribed acts. What gestures constitute grossly indecent conduct is not confined to actual physical contact. Thus, Labouchere could, in his explanation to the House of Commons quoted above, describe the crime as a kind of "assault". At common law, assault had been distinguished from the crime of battery on the basis that the former was an act which causes another to *apprehend* imminent violence to his person, while the latter had been an act which *inflicts* violence on the person of another. In short, gross indecency as a species of assault reads in the act(s) of men the effects registered in another - and not just on the participant but also a third person. It is this effect which legally constitutes the gross indecency of the act. We will have to return to this notion of "effect", but for the moment I will note the range of acts that might be said to create this effect. As remarked already, the act committed is not confined to actual physical contact. For example, take the case of R v Hornby and

Peuple⁶³. The report is of an appeal against conviction for gross indecency. The event becomes a legal problem when a police constable "went into this lavatory" and saw that "Peuple was in a bending attitude with his trousers down and Hornby was standing with his penis out, which was in a state of erection". With this snapshot firmly fixed by the legal gaze, Linsky J. notes the judges must be cautious not so much as they address the event but as they address the court. He states: "in this class of case, it is understandable that the judge or chairman [of the lower court], having regard, possibly, to the feelings of the jury and other people in court, is apt to pass over the full details of the evidence". With such indirection in mind, Linsky concludes that, although the legal representation of the event might be indecent by virtue of its audience, "I, personally, would take the view that it is possible if two people are acting in concert to act in an indecent manner, that there may be gross indecency by one person with another even though there is no actual physical contact". This is his personal view - in this appeal, Linsky J. did not have to decide the issue. Four years later, in R v Hunt and Another, Lord Goddard CJ. baldly asserted that "it is quite clear that physical contact is not necessary to constitute the offence."⁶⁴ Again, the legal institution must construct for itself, in order to judge, an indecent representation. In order to convict of gross indecency, the Court must repeat the crime. Thus, Lord Goddard states: "I do not propose to go through the disgusting evidence". Yet, as his subsequent remarks make clear, the disgust resides not in the acts of the two men (whatever those acts may have been) but in the gaze of the law. I quote at length: "[t]hey

⁶³ R v Hornby and Peuple [1946] 2 All ER (Annotated) 487-88.

⁶⁴ R v Hunt and Another [1950] 2 All ER 291-2 at 291.

are two grown men [later he notes, that as such they are "no doubt thoroughly ashamed of themselves"], and they were watched by the police because their movements caused suspicion, and they were found in a shed in positions which can only be described as constituting filthy exhibitions by *the one to the other*."⁶⁵ Just as Lord Goddard writes himself out of the description in order to locate the indecency in the acts of the accused, so too he erases the police observer when he notes that the exhibition is *by the one to the other*. The structuring role of the look of the law does however return in the form of a supposition. After referring to physical contact as "touching their private parts, or something of that sort, with hands", Goddard states in the conditional logic of law that "if a third person had walked into this shed, he would have seen the most shocking indecency between the appellants". The point here is not so much the disgusted tone of outrage but that the crime of gross indecency installs the principle of designation in a third term - the law. And it does not matter whether the third term is present or absent - the acts are indecent in advance because the law has already indemnified itself as the a priori of indecency. This situation is not changed in more recent judicial pronouncements when the tone or disgust becomes muted, when the constative is privileged over the performative. Hence, the cold logic of classification in the Wolfenden Report: "from the police reports we have seen and the other evidence we have received it appears that the offence usually takes one of three forms: either there is mutual masturbation; or there is some form of intercrural contact; or oral-genital contact (with or without emission) takes place. Occasionally the offence may take a more recondite

⁶⁵ R v Hunt and Another, at p. 291.

form..." (para. 105). If these are the conventional *forms*, then we should note that the ancillary offences of procuring and attempting to procure an act of gross indecency extends the range of acts even further. Thus, in the 1987 appellate case of Chief Constable of Hampshire v Mace, a note which read "let me feel and suck your cock" was without more presumed by Taylor J. to be "an invitation to commit an act of gross indecency". Perhaps even more bizarre, some three months before the Sexual Offences Act 1967 it was held that, contrary to section 32 of the Sexual Offences Act 1956 [importuning in a public place for immoral purposes], the greeting "Hello" is an invitation in and of itself to immoral acts.⁶⁶

What can be extracted from this excursus into the subsequent judicial rehearsals of gross indecency is that, whereas in buggery the required act is penetration, gross indecency extends the range of acts legally recognised as grossly indecent. The indecency of these acts does not inhere in the acts but rather in their legal re-cognition. It is the gaze of the law - emanating from a point that is both absent and present - which produces the male body, which materialises the male body as a body traversed in its entirety by desire. Like Debrett's, the legal manual legislates the minutiae of the body as it conducts itself with (acts "in concert with") other male bodies - its postures, its gestures, its nods, winks, its words. In short, its "attitudes"⁶⁷. The law anatomises the

⁶⁶ Chief Constable of Hampshire v Mace (1987) 84 Cr App R 40-4 at p. 41; Dale v Smith [1967] 2 All ER 1133-6.

⁶⁷ Something of the semantic range of this term can be gleaned from report of R v Hornby and Peaple, op. cit. Compare the suggestion that if "two male persons kissed each other under circumstances which showed that the act was immoral and unnatural" then it would be indecent. See L. Radzinowicz (ed) (1957) Sexual Offences, p. 349. As it was stated in a recent OutRage demonstration, the aim of the

intersubjective male body to such an extent that it cannot but speak, communicate.

As the above description suggests, the legislation of gross indecency is concerned with more than acts. This "more" is part and parcel of several movements that are taking place in criminal justice throughout the nineteenth century - the invention of the law of attempts; a transformation in the doctrine of intentional responsibility; the subordination of substantive criminal law to the law of proof; and the emergence of a distinction between the private and the public. All four movements contribute to, without exhausting, the space in which the crime of gross indecency takes place. It remains then to describe them.

It has been noted by Cohen that the crime of attempted buggery is a precursor to the crime of gross indecency⁶⁸. The crime of attempted buggery was first introduced in the 1861 "Act to consolidate and Amend the Statute Law of England and Ireland relating to Offences Against the Person"⁶⁹. This Act was coincident with a more widespread movement

demonstration was "to highlight how gay men cruising and swapping names and numbers or even merely winking at each other can be prosecuted, convicted and imprisoned": quoted in "A Wink from Gays to Warders", *Guardian* 2 March 1992 p. 1. See also the use of breach of the peace offences to anatomise the homosexual - for example, *Masterson v Holden* [1986] 3 All ER 39, and the reading of this case in P. Goodrich (1990) *op.cit.* pp.230-59.

⁶⁸ E. Cohen (1989) *op.cit.* p.216 fn.49. Cf *R v Hornby and Peaple*, *op.cit.*, where gross indecency is used as a fall back charge in the event that the primary charge of attempted buggery failed. A cautionary note should however be entered here. It has become conventional to argue that gross indecency extends the crime of buggery. What such a reading does is to constitute buggery as one species of the genus indecency. No doubt this is the current position but in the nineteenth century the conversion of buggery into an indecency requires a good deal of work. The following discussion tries to suggest some of that work.

⁶⁹ 24 & 25 Victoria, Cap. C.

across criminal justice to prosecute inchoate crimes⁷⁰. With an attempt, what is legislated is *any* act. It may even be "a perfectly innocent and harmless act"⁷¹. At common law, all that was required was that the act be proximate to the act of buggery. In the language of R v Eagleton, the acts had to be "immediately connected" with the complete crime in order to be an attempt. In current language, the doctrine of attempts legislates those acts which may be preparatory to the crime but which are also "more than merely preparatory"⁷². In effect, with the doctrine of attempts acts become no more than peripatetic moments in a narrative totality that is *the* crime. The crime - as a formal category of law - is a narrative in which an attempt is just the beginning. In such a narrative schema, attempted buggery locates any particular act (wink, nod, hello, body attitude) as a kind of foreplay, the *telos* of which is penetration *per anum*⁷³. As such, fellatio can be as bad as buggery. In the post-Wolfenden case of Peter Charles Willis, referring to cases of indecent assault on boys by men, Lawton LJ makes the following remark: "it must

70 In criminal law, inchoate (incomplete) crimes are incitement, conspiracy and attempts. For a concise account of these offences in context, see N. Lacey et.al. (1991) Reconstructing Criminal Law, pp.41-3, 127-45.

71 J. Smith and B. Hogan (1992) op.cit. p. 304.

72 R v Eagleton (1855) Dears CC 376 at 515. The formula "more than merely preparatory" is to be found in the Criminal Attempts Act 1981 section 1(1), an Act which styles itself as a repeal and rationalisation of the common law.

73 The etymological network provides the connections. An attempt is an *incomplete* crime. It is an act *proximate* to the completed act. *Telos* means "complete", and derived therefrom, is *tele* meaning "distant". In short, an act is distant from the end but close enough to have the end in sight. An attempt - as with all inchoate crimes - is a crime that is always already on the road to completion. In such a teleological schema, the beginning is judged by the end: indecency is adjudged as if it was buggery, as much as buggery is adjudged as if it was indecent.

be remembered that in these cases it is not the label of indecent assault which is important but the nature of the act. In many cases it amounts to no more than putting a hand on or under clothing in the region of the testicles or the buttocks. Such cases are not serious. In some the assault may take the form of a revolting act of fellatio, which is as bad as buggery, maybe even more so."⁷⁴ Once *the* crime is formulated in the teleology of narrative, fellatio can be worse than buggery, the beginning worse than the end. The significance of attempted buggery is that it provides one point in which gross indecency and buggery cross over into each other: indecency can be adjudged as buggery, as much as buggery can be adjudged as indecent. Once the category of crime becomes narrativised the crimes of gross indecency and buggery can be assimilated⁷⁵. It is on this legal vector of value that a space is opened up for the crime of gross indecency.

So far I have been tracing the affinities between attempted buggery and gross indecency at the level of their respective proscribed acts. However, and perhaps more importantly, the emergence of a doctrine of attempts marks a reversal in the hierarchy between conduct and mentality, *actus reus* and *mens rea*. In the law of attempts, the mental element assumes paramount importance in a formal construction of the crime. I have already noted that, in the eighteenth century, buggery was formulated as a temporary confusion in the will, and thus a

⁷⁴ Peter Charles Willis (1974) Cr App R 146.

⁷⁵ The categorisation of buggery, attempted buggery and gross indecency provides a formal trace of this assimilation: buggery is a felony, attempted buggery is a misdemeanour, and gross indecency is introduced as a misdemeanour. That is, gross indecency and attempted buggery are assimilated in the category of misdemeanours and together distinguished from the felony of buggery.

potentiality in us all. From the late eighteenth century and throughout the nineteenth, this narrative of the will is supplemented by another formulation of intention⁷⁶.

If crimes are (confused) expressions of the will, then the act will have provided the evidence of the will. In evidential terms, the act provides a vivid demonstration or revelation of the operation of the will. Here, will is understood in the strict and delimited sense of aim or purpose. From the beginning of the nineteenth century, however, a secondary elaboration is grafted onto this notion of the will. The "will" means not so much the aim or purpose of the accused, but rather the consequences or effects of the accused's actions. In doctrinal terms, the accused is taken as intending the natural consequences of his actions. The specific act recedes into the background, and it is the *circumstances* within which the act takes place which provide evidence of the will. The legal subject is no longer held responsible for his acts but for the results which, in an empiricist frame, necessarily ensue from his acts. This reformulated epistemology opens the space for the legal apparatus to redirect itself towards a wide-ranging and intensive investigation of the context of the act - or, as it would come to be formulated, an intensive interrogation of "the position" in which the two men put themselves such that a grossly indecent display results. In doctrinal terms, the substantive law of crime gives way to and depends on the procedural law of proof. The criminal law becomes a formalisation of evidential technologies. It will have been these

⁷⁶ It is also possible to note this transformation in the formula of the will in the obscenity law of the mid-late nineteenth century. The battle between two formulations is dramatised in R v Hicklin, a case which forms the focus of discussion in the preceding chapter.

evidential technologies that anatomise the male body, that produce the intersubjective male body of gross indecency.

But this transformation not only changes the object prohibited and produced, but also changes the objective of control. By focussing on the effects of acts, their consequences, the objective becomes a policing of the streets. In putting flesh on this claim, I will attend first to the changes in the formal law of proof and then to the formal requirement of display in the substantive law of gross indecency.

If the invention of the law of attempts, and the introduction of the crime of attempted buggery, is one of the major changes in the law of buggery in the nineteenth century - then the other major change is an alteration in the requisite proofs. The law of attempts introduces a notion of the will as effect; the alteration in the proofs required will have altered the prohibited consequence of the act.

In 1828, Sir Robert Peel, founder of the modern police force, proposed an Offences Against the Person Bill. The Bill styled itself, after Blackstone's Commentaries, as a consolidation of the law of public wrongs against the person of the individual. The Bill proposed that emission of seed was no longer necessary for the proof of buggery - all that was necessary was penetration *per anum*. At least since Coke's rewriting of the 1533 statute prohibiting sodomy, what had been required in the way of formal proofs was penetration *and* emission of seed. It is as such that buggery was an act which breached the reproductive

genealogy, both a literal and figurative corruption of blood lines⁷⁷. However, in the first thirty five years of the nineteenth century, the number of arrests and prosecutions for sodomy in England rose dramatically⁷⁸. Such an increase no doubt takes place within the space opened up by the Blackstonian recategorisation of buggery, or sodomy, as an offence against the person. And further, in as much as the law posits buggery as a personal offence rather than a reproductive offence, there is also no need for proof of emission. In 1828, the Offences Against the Person Act abolishes the dual proof and states that all that is formally required is proof of penetration⁷⁹. This formal restriction in the proof of buggery opens a supplementary field which will have been named as indecency. As Cohen has documented in detail, buggery in

⁷⁷ Cf. J. Weeks (1977) *op.cit.* p. 14: "'Sodomy' was a portmanteau term for any form of sex that did not have conception as its aim, from homosexual acts to birth control." Sodomy was and is an utterly confused term. What I am picking out here is one element carried in that confusion - the formal legal proofs required for *buggery*. But also that the confusion is not negative but productive - both at the linguistic level in that it holds together a range of resonances in a complex, and at the extra-linguistic level of an intensive policing of the streets.

⁷⁸ No doubt this was part of the more general discourse on the increase in crime in the first three decades of the nineteenth century. But, as Harvey has noted, there is both a synchronic and a diachronic differentiation of sodomy: "During the first thirty-five years of the nineteenth century more than fifty men were hanged for sodomy in England. This was less than a seventh of the number of people executed for murder in the same period, though in one year, 1806, there were more executions for sodomy than for murder. Nevertheless, it was the case that in the first third of the nineteenth century trials and executions for sodomy were much commoner than they had been in the earlier period." A. Harvey (1978) "Prosecutions for sodomy in England at the beginning of the nineteenth century", *The Historical Journal* vol.21 no.4 pp.939-948 at p.939. The death penalty for sodomy was repealed by the Offences Against the Person Act 1861.

⁷⁹ See *Reekspear* (1832) 1 Mood CC 342; *Cozins* (1834) 6 C&P 351. By 1889, proof of penetration had dovetailed with the law of attempt. If penetration is impossible, then charge the male person with attempted buggery: see *R v Brown* (1889) 24 QBD 357.

this period is becoming a question of decency⁸⁰. Additionally, indecency is becoming a question of empirical proof of the *circumstances* in which acts are deemed to take place. As Labouchere was to argue in 1885, the introduction of his clause 11 into the 1885 Act was designed to facilitate proof of this new legal object⁸¹ - the act of one male person addressed to another male person which in itself creates an exhibition addressed to a third person.

In sum, what I am suggesting is that the change in intention (from purpose to consequence); the increasing domination of intention as the criteria of responsibility; the change from the act to the circumstances as proof of intention; and the invention of the law of attempts; - all these are strands in a discursive complex which, on the one hand, creates a new object in legal regulation, and on the other, defines a technology for administering that new object, for making the new object visible in and for law. We can thus turn to that final addition made by the crime of gross indecency to the crime of buggery: namely, section 11 states that the act can be performed in "private or public". This has been the focus of much of the discussion of section 11, a discussion conducted primarily in terms of the failure to distinguish between the private and the public. What I want to suggest is that, in the context of the discursive

⁸⁰ E. Cohen (1989) *op.cit.*; see also L. Moran (1989) "Sexual fix, sexual surveillance" *op.cit.* for a cultural history of the legal representation of homosexuality as indecency.

⁸¹ Labouchere's motive in introducing section 11 has often been noted as obscure in the extreme. Apparently, he had read a report on male prostitution, and he had this in mind when legislating gross indecency. Such a motive is consistent with the kind of proof that is being elaborated - proof of empirical circumstances. On the general question of Labouchere's motive, see F. Smith (1976) "Labouchere's Amendment to the Criminal Law (Amendment) Act", *Historical Studies* vol. 17 no.67.

complex sketched above, the reference to "private or public" is rendered intelligible by the legal investment in the consequences, in the *effects* of acts. It is not so much a failure to draw a distinction between the private and the public, but rather the notion of indecent effects posits privacy in a quite specific way.

The crime of gross indecency between men is a crime that, at both formal and substantive levels, belongs to a tradition of public order offences. The specification of such offences had been consolidating itself throughout the nineteenth century around the offences of riot, unlawful assembly, and breach of the peace. Public order was a problem of the administration of justice - a question of the foundation of its right to punish. The problem addressed in these offences is the effect of conduct on an onlooker. It is this effect which constitutes the indecency which is legislated and which allows for section 11 to oscillate between privacy and publicity. What is grossly indecent conduct is the *display* or *exhibition* of amorous relations between men. Gross indecency, by definition, involves three characters: a male person addressing (acting in concert with) another male person, *and* that concert itself addressing a third person. More correctly, these two addresses are collapsed such that the first always already entails an address to a third person. This third person does not refer to an empirical presence - such as a police observer, although it is the police spy that frequently embodies the function. The third person is a *function*, a principle of designation - it dogmatically distributes places to the two male persons such that they are engaged in an address to an absent Other. What thus links the private and the public as alternatives in section 11 is that both categories entail the absent presence of a third

person. The private is not simply defined as that against which the public makes an appearance and thus not simply a field of action in which there is no Other. To put this another way, the distinction between the private and the public is not legally relevant - either as that which is used or as that which is disavowed in law. To point to the lack of a distinction as a failure - and therefore to be condemned - is to pass over the specific rationality operative in section 11. The operative rationality is not conducted in terms of the private and the public but rather as a calculation of harms. In other words, the categories of public and private are being used in their Millian sense. That is, harm to self and harm to others can occur in both the private and the public realms. As such, the objective basis of the right to punish is that the law discriminates not between the private and the public but between harm to self and harm to others. Legal regulation is legitimate if its calculations distinguish between these harms and only regulates harm to others. Everything else simply falls outside the domain of legal regulation.⁸²

It is this calculation of harms to others which informs the reiterated description of the accused as "two men put[ting] themselves in *such a position* that it can be said that a grossly indecent exhibition is going

⁸² See the Millian formulation of the objective and subjective right to punish, J.S. Mill (1962) Utilitarianism, esp. the essay "On Liberty". Compare the Wolfenden Report's use of the private/public distinction in the 1950s, which is somewhat different. In the Wolfenden Report, the private is formulated as a cohesive and closed domain, which by fiat has no Other. Attention to the language of section 11 however indicates that the crime of gross indecency always entails three characters. In addition, for Mill, the private simply falls outside the domain of legal regulation - although according some role to public opinion - and thus does not formulate the private as a cohesive and closed domain. For a close reading of the indeterminate taxonomy of private and public in the Wolfenden Report and after, see B. Brown (1980) op.cit.

on"⁸³. It is the positioning - whether public or private - that constitutes the display prohibited in the crime of gross indecency. The gestures of the male body addressed to another male body are always already a performance designated indecent by an absolute third term. In this sense, one might say that the crime of gross indecency is the legal constitution of "everything as political".

The triangular structure of display provides the most distinctive contribution of gross indecency over and against buggery in the nineteenth century. It is this structure that accounts for the initial characterisation of the crime as one of a number of "outrages on decency"⁸⁴. The crime is part and parcel of a mode of regulation, the key term of which is not repression but rather a policing of social spaces. What is being regulated in the crime is the eroticisation of social spaces, an eroticisation designated by the legal terms of display and exhibition. We should not however mistake this for a crime against sexuality - whether it be masculine and/or hetero. What provides the subjective right to punish is not a sexuality intrinsic to the persona of the indecent performer, but rather an erotics that circulates through and in the social. In this respect it is worth remembering that the Criminal Law (Amendment) Act is concerned with regulating prostitution as a phenomenon of the urban streets and, more specifically, that section 11 was not only concerned with the crime of gross indecency but also its ancillary offences - being a party to the crime, and procuring or

⁸³ R v Hunt [1950] 2 All ER 291-2 at 291.

⁸⁴ This was the phrase used as a marginal note identifying the section in the Criminal Law (Amendment) Act 1885.

attempting to procure the crime⁸⁵. In short, the "object" of legality is not the obscure workings of a sexuality, but the social theatre in which the male body is a performer. And the administration of this justice is a policing of the social - the distribution networks through in and by which sociality is eroticised. In the strictest sense, gross indecency is an obscenity and, like obscenity (*ob-scaena*), it is a crime against sociality rather than a crime against sexuality⁸⁶.

Finally, before leaving the crime of gross indecency, we should note the point at which it formally rejoins the crime of buggery in the legal taxonomy. In 1956, when a statute consolidating sexual offences was passed, the crime of gross indecency is placed side by side with buggery, and the statute categorises them both as one of a series of "unnatural offences". No doubt it is possible to describe such a designation as a violent reassertion of the sodomitical over the indecent.

⁸⁵ On the regulation of prostitution as a medico-social problem, see J. Walkowitz (1980) *Prostitution and Victorian Society*. On male prostitution in particular, see J. Weeks (1991) *op.cit.* chap.3. See also the Vagrancy Act 1898 section 8 which stated that any person who knowingly lived wholly or in part on the earnings of prostitutes or who in any public place persistently solicited or importuned for immoral purposes was to be deemed a "rogue and vagabond" and thus subject to the penalties contained in the 1824 Vagrancy Act. And, for the general law on aiding, abetting, counselling and procuring the commission of an offence at the time of the Criminal Law (Amendment) Act, see the Accessories and Abettors Act 1861 section 8.

⁸⁶ Cf. *Thomas Courtie* (1983) 77 Cr App Rep 252. On an appeal against a sentence for buggery, Watkins LJ. stated at p. 257: "the appellant behaved towards Rodmell in a most violent and obscene way". On obscenity in the late nineteenth century, see *R v Hicklin* and my discussion in chapter 2 in which obscenity is described as a problem in the policing of streets. Cf. the disarticulation between gay sexuality and obscenity described in C. Stychin (1992) "Exploring The Limits: feminism and the legal regulation of gay male pornography", *Vermont Law Review* vol.16 pp.859-902. The contemporary purchase of this comment is that much of the direct action of gay liberation protests not so much against the repression of sexuality but rather draws on this other tradition of social regulation.

But this would be to ignore the way in which buggery was, over the nineteenth century, transformed into a problem of indecency. Or rather, the way in which buggery and indecency had been brought into a relation such that they supported each other. In other words, is it not that the problem of the unnatural in 1956 is different to the problem of the unnatural in the classical law of the eighteenth century? Such a possibility is at least suggested by the fact that the Sexual Offences Act 1956 is drafted and enacted one year before the publication of the Wolfenden Report. I thus end the description of the various legal dispositions of buggery and indecency with the beginnings of the Departmental Committee on Prostitution and Homosexual Offences.

Wolfenden's connection with the Committee begins on a fateful summer morning in 1954. He receives a phone call from the then Home Secretary's Private Office. Wolfenden is asked to come and speak with the Home Secretary in the following week, but the meeting is forestalled by a chance encounter on a sleeper train from Liverpool to London⁸⁷. Wolfenden describes the encounter in exquisite undertones: "Inquisitively looking down the list of fellow travellers, as one always does, I was entertained to find the name of Sir David Maxwell Fyfe, the Home Secretary ... As the train left I wrote a note suggesting that if it would save his time next week we might have some conversation now. His detective took it in to him and came back with the reply that the Home Secretary would be very glad to see me straight away.

⁸⁷ The fortuitous is a repeated trope in discussions of the homosexual-in-law. See R v Brown, discussed above, which notes that the videotapes providing the primary prosecution evidence are, according to Lord Lane, discovered by chance.

"I suspect that he had been half undressed when he got my message. But he nobly put his overcoat over what was left; and so it happened that my first conversation about this whole business took place as we sat side by side on his sleeping-berth. By the time I left him after Crewe and lurched back to my own compartment my head was in a fair whirl."⁸⁸ When the Wolfenden Report is published in 1957, it sells 5000 copies in three hours - and the press and television treat their audiences to the familiar figure of Wolfenden playing with his pipe. In 1958, he announces that it is "only a matter of time" before legislation is forthcoming. It will take ten years. In 1963 a national opinion poll shows that sixty seven percent of the population are opposed to decriminalisation, and sixteen per cent are in favour. And now rather than Wolfenden and his pipe, radio announcers and television presenters are instructed by the BBC to pronounce "homosexual" as "hommo-sexual"⁸⁹. Two years later, another national opinion poll argues that sixty three per cent of the population are this time in favour of decriminalisation of homosexuality. And Humphrey Berkeley MP introduces a Bill which proposes to change the law. But matters of national importance interrupt as a general election is called, Harold Wilson is returned as Prime Minister, and the Bill is reintroduced. In 1967, the Sexual Offences Act is passed - and passed off as a liberal reform of the law relating to homosexual offences.

⁸⁸ J. Wolfenden (1976) op.cit. p.129

⁸⁹ It is interesting to note that such a pronunciation emphasises the etymology of the word - *homo* meaning same but as *hommo* it also emphasises that the same is man.

What I have been doing in this somewhat extended excursus is not so much describing the social history prior to the 1967 Act - although of course such a commentary is necessary - but rather, I have been using this history to pose a problem in and for the 1967 Act. I have described a history different to that presupposed by the Sexual Offences Act 1967. It consists of a series of re-formulations of the object of legal judgement. In short, I have tried to describe not so much the experience of homosexuality but rather the dispositions of a legal apparatus as it recognises an affective male body as a subject and target of government. In doing so, it has been possible to retrace a set of discontinuous traditions. These traditions have provided the symbolic resources for the contemporary rehearsal of the homosexual-in-law. The contemporary is that "there is no legal instance specifying the attributes of persons consistently and coherently"⁹⁰. More specifically, the question such a history poses for the 1967 Act is that in none of these histories have buggery and gross indecency been taken as crimes *against* sexuality. What is not being judged - and punished - is a normal deviation from a sexual norm. In other words, homosexuality is not a legal infraction. What then is the 1967 Act doing when it writes of "homosexual acts" as *if*, prior to its passing, such acts had been crimes? What is the story of homosexual law reform that it can describe the 1967 Sexual Offences Act as a "decriminalisation" of homosexuality - albeit a partial decriminalisation?

"Homosexual acts" transforms the various histories of buggery and gross indecency. As the phrase suggests, the criminal legal

⁹⁰ P. Hirst (1986) "Law and Sexual Difference", Oxford Literary Review vol. 8, nos 1-2 pp. 193-7 at 193.

apparatus still desires the punishment of conduct, but what is punished in that conduct is different. The acts of buggery are no longer produced as material signs of unbelief, as signs of the unnatural, as signs of marital misconduct and reproductive errancy, as signs of an inhumanity that is unmanly, as signs of an offence to others - or, more correctly, they are no longer primarily produced as these signs. The legal apparatus will have produced the acts as signs of an absence - but this time decriminalisation rewrites sodomitical and indecent acts as symptoms behind which there exists an obscure object, an object which must be bodied forth, made manifest. The legal apparatus operates as a symptomatology which solicits an instinct, a libido, a force intrinsic to the personality but which is always already liable to go astray and thus demands external checks and controls. Buggery and gross indecency will have been expressive manifestations of a cohesive and all-inclusive domain of sexuality. The legal apparatus insists on reading the wayward paths of homosexuality in and through a legal optics of buggery and gross indecency. It is this optical imperative which materialises the homosexual-in-law. "Homosexual acts" is no doubt a "neologism"⁹¹. But more than this, the novelty of its logic is violent - a yoking together of heterogeneous traditions in a complex that is designated homosexual. As such, its rhetorical structure is catachrestic - the use which is an abuse of the homosexual. "Homosexual acts" functions to bind together a volatile mix of traditions into a coherent and closed complex: it is a weaving together of different strands which is at the same time a defence against their heterogeneity, their undoing. The Sexual Offences Act 1967 is the formal instance and insistence of this catachresis.

⁹¹ The term is well-worked in L. Moran (forthcoming) "Of Buggery and Its Neologism", op.cit.

Henceforth, legal reform, statutes, and law books will have inscribed the homosexual - homosexual crimes.

And so too, the judiciary. It is not until the 1950s that the reported cases (ab)use the term "homosexual". In 1961 Lord Tucker anticipates the legal reform of 1967 when he poses the rhetorical question: ""Suppose Parliament tomorrow enacts that homosexual practices between adult consenting males is no longer to be criminal, is it to be said that a conspiracy to further and encourage such practices amongst adult males could not be the subject of a criminal charge fit to be left to the jury?"⁹². In the context of the crime of gross indecency, not one of the seven reported cases in England makes any mention of homosexuality, homosexual practices, or homosexual acts⁹³. In 1967, some three months before the Act comes into force, the report of Dale v Smith mentions "forty-five indecent photographs which included photographs of male persons indulging in homosexual practices"⁹⁴. In this case, the accused was charged with soliciting and persistent importuning by a male person in a public place contrary to section 32 of the Sexual Offences Act 1956. It was held that saying "hello" to a "youth"

⁹² Shaw v DPP [1961] 2 All ER at 463. See also discussion of this case in Kneller (Publisher, Printing and Promotions) Ltd and others v DPP [1972] 2 All ER 898-938. Significantly, these cases reiterate the crime of gross indecency and also provide the terms in which section 28 of the Local Government Act 1988 is formulated, debated, and legislated.

⁹³ The cases are: The Queen v Jones and Bowerbank [1896] 1 QB 4-6; Thompson v DPP [1918-19] All ER Rep 521-30; R v Hornby and Peaple [1946] 2 All ER (Annotated) 487-88; R v Hunt and Another [1950] 2 All ER 291-2; R v Pearce [1951] 1 All ER 493-4; R v Burrows [1952] 1 All ER 58; R v Hall [1963] 2 All ER 1075-8. After 1967, all these cases will be referred to as if they dealt with "homosexual crimes".

⁹⁴ Dale v Smith [1967] 2 All ER 1133-46 at 1135.

in a public lavatory could and would be treated as importuning for immoral purposes.

The change in the judicial lexicon is imitated by the criminal legal textbooks. And most dramatically in Smith & Hogan's Criminal Law⁹⁵. The first edition is published in 1965. It writes - with some despatch - of buggery and gross indecency. Its sixth edition in 1988 lists these crimes in its index as "homosexual acts", and then translates this phrase to mean primarily buggery between men and secondarily gross indecency between men. In the substantive discussion, moreover, these crimes are discussed under the heading of "Unnatural Offences". And finally, in the seventh edition in 1992, they add an apologetic footnote: "Some may regard this term as offensive, but it is the heading in the Act."⁹⁶ The discussion is thus an utterly confused incorporation of several of the strands in the histories re-traced earlier. Furthermore, in the discussion of gross indecency between men, Smith & Hogan quote the Wolfenden Committee blithely summarising the wondrous evidence that there is considerable variation in homosexual relations. The less-than-implicit conclusion here is that, since there is considerable variation in homosexual relations, there must of necessity be considerable variation in the acts of gross indecency. In short, gross indecency and buggery

⁹⁵ I take Smith & Hogan as my example not only because it is dramatic but also because it is the hegemonic textbook in current scholastic criminal law. What I say of it could be said of most of the criminal law textbooks in circulation today. The only breach is to be found in the cursory statement of N. Lacey et. al. (1991) op.cit. p.352: "The prohibition against buggery is not specifically homosexual in its coverage". Such a statement does however gloss the effect of the 1967 Act in rewriting the offence of buggery.

⁹⁶ J. Smith and B. Hogan (1992) Criminal Law, 7th edn p.477. See also the first edition and the sixth edition, for the mentioned variations.

become crimes that homosexual males commit⁹⁷. The con that "homosexual acts" institutes in 1967 is the fusion of homosexuality with buggery and gross indecency.

As such, the 1967 Act is certainly a reform of the law. But it is not a reform which simply did or did not guarantee homosexuals, under the aegis of liberal democracy, freedom from legal prosecution. In this respect, and at the formal level, it can be noted that the 1967 Act approximated Labouchere's stated intentions concerning the penalty for gross indecency. Labouchere initially suggested that the maximum penalty for the crime should be seven years. He was advised against it and the 1885 Act prescribed a maximum of two years. The 1967 Act increases the maximum to five years (at least where one of the male persons is under twenty one years of age). Further, the 1967 Act continued the invention of gross indecency as first and foremost a problem of the *administration* of justice - or, in the terms used earlier, the policing of social spaces. The 1967 statute streamlines the investigation, trial and punishment of "homosexual acts" by creating the option of dealing with them in the magistrate's courts without the benefit of a jury. What these formal changes register is that "homosexual acts" are

⁹⁷ This is not to say that the identity between homosexuality and buggery is complete. Rather, I am describing that which is promised in the textbooks, the statutes, in law reform. For explicit judicial promises to this effect, see Gerard Joseph Wall (1989) 11 Cr App R (S) 111-3 noting at 112: "Non-consensual buggery between adults is, in the experience of this Court at any rate, a relatively rare offence ... the far commoner offence [is] consensual buggery, or buggery committed on young men and boys". See also the reduction of buggery to males in R v Courtie [1984] 1 All ER 740-47, and section 1(7) of the Sexual Offences Act 1967 when read in conjunction with section 1. The promised reduction is however impossible. Thus, see R v Ellis and Others (1986) 84 Cr App R 235, Daniel Gaston (1981) 73 Cr App R 164, and R v O'Sullivan and Others, 27 February 1981 [lexis report], evoking buggery involving man, woman and beast.

administrative offences. And it is as such that the reform guarantees freedom from prosecution. As is well-documented, the persecution of homosexuals increased fourfold in the twelve years succeeding the passing of the statute⁹⁸. This increase and subjugation is not, however, simply a result of wayward police practices - of practices that depart from the liberal norm of legality embodied in the reforming statute. Rather, they are contained in the very form of desire for reform that constituted the 1967 Act. Decriminalisation is not the attribution of innocence to homosexual acts. As O'Connor LJ puts it, "In 1967 the law was altered at the same time as various homosexual acts were declared to be *not unlawful*"⁹⁹. The decriminalisation of homosexuality is not a withdrawal of disapproval but a metamorphosis in the form of legal disapproval and the legal object thereby subject to disapprobation. In the future perfect, the "homosexual" will have been realised as a *moving resultant* of liberal law.

In sum, the 1967 Act involved a reform of the law and a reform of the homosexual. It involved the former in as much as it changed the formal rules and rewrote the histories of particular crimes, and the latter in as much as it produced the homosexual-in-law as a visible entity. Thus, although the phrase "homosexual acts" summons up the crimes of buggery (or sodomy) and gross indecency between men, it also supplements these crimes with the category of the homosexual. The homosexual is read back into the crimes of gross indecency and

⁹⁸ Home Office (1979) Sexual Offences: Consent and Sentencing. As P. Crane (n.d.) *op.cit.* notes at p.14: "the police have resolutely exploited these new avenues".

⁹⁹ R v Ellis and Others (1986) 84 Cr App R 235 (my emphasis).

buggery, thereby transforming these crimes into homosexual crimes. The effect of this reformation of the past is that, *in future*, the referent of buggery and gross indecency is "the homosexual". The very institution of homosexual crimes is the first betrayal of homosexual law reform. That betrayal is repeated in Section 28 of the 1988 Local Government Act. The crime of gross indecency is one precursor for this section. It was the element of display (or exhibition) which constituted the offence in gross indecency. When such a display is metamorphosed into a homosexual crime, it is but a short step to outlawing the homosexual personality *outright*. There is little difference to be had between gross indecency as the necessary display of homosexuality and section 28. The Local Government Act of 1988 styles itself as a "prohibition of political publicity" - and it is as a form of political *publicity* that section 28 prohibits the "promotion of homosexuality"¹⁰⁰. The betrayal of homosexual law reform is that it betrays what Watney has called, in another context, "a displaced desire to kill them all - the teeming deviant millions"¹⁰¹. To be an outlaw is to be prohibited outright and hence the outrage.

¹⁰⁰ Compare the language of conspiracy in DPP v Shaw affirmed in Knulier v DPP, which speaks of "furthering" and "encouraging" homosexual acts between consenting adult males.

¹⁰¹ S. Watney (1987) op.cit. p. 82. Watney is here describing a discourse on AIDS which fantasises that gay men are killers. This fantasy he suggests is a displacement of the desire to eliminate gay men en bloc. No doubt such an absolutist project of extermination characterises the position of a moral majority. I would however suggest that this is not definitive of contemporary modes of the legal regulation of gays. As I suggest in my discussion below, this is only one arm of a doubled strategy of administration - the other arm being incorporation. In the context of section 28, see the nuanced reading by A. M. Smith (1990) "A Symptomology of an Authoritarian Discourse", New Formations, no.10 pp. 41-63.

Unconditional Law, Conditional Love

What then is this other figure, the homosexual-in-law, which comes to lend its charms to the crimes of gross indecency and buggery? He is a recent invention, a category first used in the late nineteenth century. He is invariably male and, like the criminal, his acts are materialised as the expression of a personal and social condition. The category of the criminal is formulated in the late nineteenth century against a formalist legality of the will¹⁰². The formulation of the criminal re-positions law as simply one element in the functioning of society. In doing so, it creates the space for the multi-disciplinary study of crime - criminology, penology, psychology, psychiatry, and the sociology of deviance. Moreover, it creates the space for liberal modes of government which would target that criminal figure unable to be captured by the legality of the Rule of Law. In a similar fashion, the homosexual is initially named as that which cannot be captured by a legality which formally defines buggery as the purposive act of the human will. In other words, like the criminal, the homosexual is posited as an absence in legality. Moreover, it is argued that legality, by virtue of this failure to recognise the homosexual, deals with the homosexual as *if* he is a sodomite or bugger. The aim of legal reform will thus have been to recognise the homosexual-in-law. Re-form is a re-cognition of the homosexual as a type. In philosophical terms, reform binds the "I must" that impels me to the "I can" of action, and binds as an object of cognition. In more

¹⁰² On the materialisation of the criminal in the late nineteenth century, see P. Pasquino (1991) "Criminology: The Birth of a Special Knowledge" in G. Burchell et.al. op.cit. For a similar reading, but which puts more ideological flesh on the argument, see D. Garland (1985) "The Criminal and His Science", British Journal of Criminology, vol. 25 pp. 109-37.

sociological terms, the homosexual is a category of moral pathology - a failure of self-control prompted by *both* a personal condition *and* an environmental condition¹⁰³. However, it is not until the 1967 Act that the homosexual as moral type makes an appearance at the formal level of legal rules.

With the figure of the homosexual what is needed is a judiciary and a police force which knows the legal rules but more importantly has the knowledge of, a studious familiarity with, the habits and habitat of the homosexual. Such a knowledge is promoted in a range of other disciplines. However, the criminal legal apparatus was immensely resistant to the promotion of the homosexual in a wide range of other disciplines. Thus, before tracing their incorporation, it is necessary to note their concerns. My concern will not be with the historical details but rather to acknowledge, in Miller's apt formulation, "the extent to which 19th century culture has contributed to the formation of the context in which an uncloseted gayness is popularly determined"¹⁰⁴.

The word *homosexual* appears in German in 1869¹⁰⁵. By 1891 it has migrated to France as *homosexuel(le)*. *Heterosexual* has a similar

103 The crucial but fragile distinction between perversion and inversion is made on these grounds. For gross indecency, it is the category of inversion that is deployed (see my discussion of Thompson's case below). It does however draw on the notion of the fetish which was formulated as the archetypal perversion. The notion of the fetish in law is more explicitly deployed in the crime of indecent assault.

104 D.A. Miller (1989) "La Cage Aux Folles", in E. Showalter (ed) Speaking of Gender, at p. 212.

105 Cf. J. Weeks (1991) "Discourse, desire and sexual deviance", op. cit. at p. 16 stating that it is invented by the Hungarian Benkert von Kertbeny in 1869.

trajectory, appearing first in German, then in English by way of translation from the Austrian, and then in France. In England, the first significant use of *homosexuality* and *heterosexuality* is to be found in the 1892 translation of Krafft-Ebing's Psychopathia Sexualis, which styles itself as a "medico-legal study"¹⁰⁶. Like most other medical textbooks on the "contrary sexual instinct", Krafft-Ebing's book addresses a legal audience¹⁰⁷. It is in this context of address that the impetus for homosexual law reform takes place. What will have been introduced in the binary classification of homosexuality and heterosexuality is the norm. The norm is not an abstract principle of the right to govern, nor is it based in either contract or status, and nor is it a prudential principle of wise authority. Rather, it is a practice of administration. The reason of the norm is a managerial reason - a way of identifying the subject as a socio-legal subject and of getting us to identify ourselves in such a manner as to make us governable. It is a practice that identifies the self and self-identity but, in doing so, it institutes a system of calculations - and specifically, a calculation of harms.

In the medical language of the late nineteenth and early twentieth century, homosexuality is a pathology. The acts of the homosexual are the expression, the manifestation of a condition - a condition that in some instances is correctable (perversion) and in other instances

106 R. von Krafft-Ebing (1920, orig. 1892) Psychopathia Sexualis, with special reference to the contrary sexual instinct (7th and enlarged edition). Krafft-Ebing was a professor of psychiatry and neurology at the University of Vienna.

107 See J. Weeks (1991) "Discourse, desire and sexual deviance", op.cit. referring to the work of Magnus Hirschfield, notes at p. 20 that: "most of the one thousand or so works on homosexuality that appeared between 1898 and 1908 were directed, in part at least, to the legal profession."

incorrigible (inversion). Despite the fact that it was on this subjective basis that the many campaigns for legal reform were conducted, the language of pathology is now out of fashion. What is rejected is the physicalist connotations of the term. Or, in more conventional language, the biological determinism. In many respects, however, the reference to biology in subsequent criticisms of the construction of homosexuality as pathological is something of a red herring. This is because the pathology of the medico-legal reformers is constructed at the intersection of physicalist and environmentalist notions of the individual. The pathology of the homosexual was, if anything, posited as a *moral* pathology. The moral condition of the homosexual was framed as a peculiar inmixing of the physical and the environmental. No doubt for some reformers, the physical was privileged over the environmental, just as for other reformers the privilege was reversed - the environmental over the physical. It is this latter hierarchy which is taken up in the more contemporary insistence that homosexuality is not so much a matter of nature as culture¹⁰⁸. In psychological terms, homosexual acts are the expression of a condition that the homosexual has learned. Or, in sociological terms, homosexual acts are the manifestation of a condition that is constructed - a matter of socialisation or politicisation. In all these formulae, the homosexual remains a determinate entity. Homosexual

108 Such an insistence can sit quite happily with more physicalist notions of homosexuality. Thus, in the wake of the HIV crisis, there has been a resurgence of physicalist determinations of homosexuality. These have represented themselves as providing the ground for reform. See the medical research into brain structures, genetics, and hormonal differences between homosexuals and heterosexuals - discussed in S. Kingman (1992) "Nature, not nurture?" Independent, 4 October pp. 56-7., commenting that "The implications of such work are enormous. If homosexuality were proved to be a biological phenomenon, the result could be a more lenient attitude by society towards homosexuals - even to the extent, in some countries, of introducing new legislation outlawing discrimination against them."

acts will have been the effect of a condition called homosexuality or, in more cultural constructionist terms, homosexuality itself is the realised effect of socio-political systems.¹⁰⁹

The homosexual thus has its provenance in medicine, psychology and sociology. And the homosexual-in-law? Each of these human sciences now function *infra-legally*. The managerial reason of criminal justice deploys the panoply of human sciences as *extra-legal* techniques for the *legal* recognition of the homosexual¹¹⁰. In doing so, the judge will have declared the law's ignorance of the homosexual and thus, like Pontius Pilate, washes his hands of what the legal apparatus does in the name of the homosexuality. Thus, Wolfenden Report will begin with the necessity of a distinction: "It is important to make a clear distinction between "homosexual offences" and "homosexuality". The former are enumerated in paragraph 77 below. For the latter we are content to rely on the dictionary definition that homosexuality is a sexual propensity for persons of one's own sex. Homosexuality, then, is a state or condition, and as such does not, and cannot, come within the purview of the criminal law." But homosexuality does not simply fall outside. Although outside, the legal apparatus will need some criteria for positing that

109 On such cultural determinations in the discourse of gay liberation - and more specifically, the resistances thereto - see J. Minson (1981) "The Assertion of Homosexuality", *m/f* nos. 5-6 pp. 19-39.

110 I take the term "*infra-legal*" from M. Foucault (1977) *Discipline and Punish*. Cf. the autopoietic theory of G. Teubner (1989) "How the Law Thinks: toward a constructivist epistemology of law", *Law and Society Review* vol.23 no.5 pp.727-57. Teubner argues that the *extra-legal* languages only make an appearance in law once they have been transformed into legal language. I read Foucault's use of the term *infra-legal* to suggest that the legal apparatus is not closed in such a manner. Rather, with respect to the human sciences, the law uses other discourses as *other* discourses and not as legal discourses.

which falls outside the formal legal rules. The homosexual is posited as an entity which presents itself to the seat of judgement. As the Wolfenden Report quickly goes on to state: "This definition of homosexuality involves the adoption of some criteria for its recognition."¹¹¹ It is the figure of adoption that holds together the inside and outside of law as the infra-legal. It is here that the human sciences enter the legal apparatus as extra-legal knowledges but which are used by the legal apparatus to posit a domain of homosexuality.

The acts of the homosexual-in-law are the expression of a condition - a condition variously determined as biological, learned, constructed, politicised. Knowledge of the legal rules is not enough. Now, in order to punish, the legal apparatus must be acquainted with the lifestyle of the homosexual, his habits and his habitat, his reasons and his reason for being. Homosexual acts are not simply breaches of a legal rule. Rather they are acts which are legally determined as moments in a lifestyle, a sub-culture that predisposes particular types of men to break the formal legal rules. It is this style of life which projects who he is. Unlike sodomy, once a homosexual always a homosexual - whether you know it or not. Unlike sodomy, homosexuality is not a potentiality in us all. Or more correctly, as I have already suggested, legal reason asserts its ignorance of the homosexual by claiming to remain agnostic as to that potentiality. At most, it posits the possibility of a homosexuality in all personalities, but declares that the homosexual-in-law is the one who manifests that potentiality in his lifestyle, his sociality. As the Wolfenden Report puts it, "it is clear that many

¹¹¹ The Wolfenden Report, paragraphs 17 and 18.

individuals, however their state is reached, present social rather than medical problems and must be dealt with by social, including penological, methods." (para. 31). Just as the validity of law is asserted as being derived from its form, so too the validity and invalidity of the homosexual is a matter of its form. It is this formalism which produces the homosexual as one of a kind. Within the formalist strategy, distinctions are drawn between the social and the political, between the homosexual who has a social lifestyle and the homosexual who has a political attitude, between the homosexual who owns his homosexuality and the homosexual who owns up to his homosexuality. In each case, the formalism will have announced the death of the political at the hands of the social. The detours of such an aesthetics of legal reason may be traced in a reading of two case reports - one, which marks the beginning of the twentieth century, and the other, which installs the Wolfenden Report strategy. In doing so, two dimensions of legal reason are held together - legal reason as a practice of simulation and legal reason as a tactic of regulation.

A Displaced Body of Evidence

"Symptomatology is always a question of art"¹¹²

We have become accustomed to think of the legal apparatus as a system of communication - a system which does not interpret subjects presented to it, but which constructs those subjects as it judges them. The homosexual as a person then in the formal language of autopoiesis

¹¹² G. Deleuze (1991) op.cit. p. 14

is a semantic artifact of legal operations¹¹³. The task thus becomes one of describing the operations of communication - the strategies and tactics of the legal apparatus. In a psychoanalytic register, the question is: *how* does the law come to desire? So far I have concentrated on the strategy of a legal apparatus which *condenses* the crimes of buggery and gross indecency with homosexuality. While I will continue to note this operation, the emphasis in the ensuing description is on a strategy of *displacement*. It is as such that the body of the homosexual is materialised, anatomised in law. The invert and the homosexual read as symptoms of the desire of legal reason for closure. It is a desire which is impossible but which is nevertheless violent. In fact, it is the legal response to the impossibility which constitutes the violence of the legal apparatus. From an ethical perspective, the violence of the legal apparatus is that it cannot countenance the question of the Other - its hall-marks, its stigmata, its make-up, its personal indicia, its signature. In retracing this violent desire, I begin with the report of a case that has now become notorious in accounts of homosexual legal politics. It signs itself as Thompson v DPP¹¹⁴.

Thompson is arrested on March 19, 1917. He had noticed two boys - their names are Maunders and Jones, but they are invariably referred to as "the boys" - following him as he went in and out of some

113 G. Teubner (1989) op.cit. p.73: "It is not human individuals by their intentional actions that produce law as a cultural artifact. On the contrary, it is law as a communicative process that by its legal operations produces human actors as semantic artifacts".

114 Thompson v DPP [1918-19] All ER Rep 521-30. Further page references to this report will be given in the body of the text preceded by the initial T. See also the decision of the Court of Criminal Appeal in this case, reported under the name of R v Thompson [1917] 2 KB 630.

shops. Taking two shillings out of his pocket, he gives the coin to them with the instruction to go and buy some soap and wash their faces. Before Maunders and Jones leave, however, the police intervene. The police had been informed - by whom is not stated - and were watching what Lord Atkinson will come to call the "strange and ... most suspicious relations with these boys" (T 525) near the Turnham Green Railway Station. When Thompson gives the coin, one of the two policemen rushes up to him and demands an explanation of what Thompson is doing with them. Jones - and later Maunders will have confirmed it - tells his story to the policeman. According to Jones, Thompson had taken them to the public urinal near the Bath Road three days previously (March 16) and there had committed acts of gross indecency with them. As to what those acts are, the case report remains silent. Moreover, on that day (the 16th) Thompson had given them two shillings and told them to meet him again at the same place three days later (the 19th). On the 19th however, and according to the boys, Thompson said he had other business and had no time. But also that there was a policeman watching. Upon hearing this, Thompson struck out at the constable who was restraining him and tried to run away. He fails, he is arrested, and he is charged with two offences - namely, assaulting a police constable, and committing acts of gross indecency on the earlier day (March 16). The latter charge is brought under section 11 of the Criminal Law (Amendment) Act 1885. According to the case report, nobody disputed that the acts of gross indecency with the two boys on March 16 had been committed. The question was: *who* committed the acts? Thompson argued that it couldn't have been him because he was elsewhere at the time - and produced witnesses to that effect. The prosecution however said it was him. As was stated by Lord Reading CJ in the Court of

Criminal Appeal, "[f]or the prosecution there was a body of evidence identifying the appellant" (T 522).

The body of evidence is firstly the stories of the two boys which identify Thompson as the man of March 16. In fact, it is these stories which provide the only *direct* evidence relating to the event of March 16. The judges believe them without question¹¹⁵. The rest of the evidence is what is in question. It is *circumstantial* evidence - that is, evidence which *tends to confirm* the truth of that which is demonstrated by other evidence¹¹⁶. It is to the circumstantial evidence that the court directs its attention. Two such items constitute the body of evidence convicting Thompson. In support of the boys' stories, the prosecution introduce powder-puffs which are found by the police on the body of Thompson when he was arrested. The second item is numerous photographs of "naked boys in various attitudes" (T 522). These had been uncovered by the police when they search the rooms in which Thompson lived. Throughout the case report, both items are said to be in possession of Thompson. Although this decides the appeal against conviction, the second question which the court addressed to itself was: is it

115 In doctrinal terms, this is unusual in as much as until last year children were one of the categories of witness presumed unreliable by the formal law of evidence.

116 Throughout the nineteenth century, the central problem addressed in the law of evidence is precisely the value of circumstantial evidence. It is of a piece with the developments traced earlier concerning the shifts in the doctrine of intention, the law of attempts, and the requirements of proof for buggery. As its name implies, it reorients the object of proof towards the circumstances in which the act takes place. As I argued earlier, it was as such that the crime of gross indecency emerges. Moreover, circumstantial evidence gives a privileged place to the operation of judicial discretion. It is also the standard fare of modern criminal justice. And as such, the law of evidence is primarily directed to codifying that discretion - that is, to codifying the search for the truth. What is in issue is not the truth but the rectitude of the search.

permissible to use the powder-puffs and the photographs as legal evidence?

These then are the two questions: one relates to the event of March 16 (the boys' stories), and the other relates to the event of March 19 (the powder-puffs and photographs). The hope of the court is to link the two in a question: does the possession of the powder-puffs and photographs by the man arrested on March 19 *tend to show* that he is identical to the man who committed the crime of gross indecency on March 16? In the strongest sense of the term, it is a rhetorical question. From the court of first instance to the House of Lords, the predestined answer is *yes, Thompson is guilty*.

The conclusion of guilt is framed by the case report as a consequence of logic, of a legal reason which is possessed by everyone and which is therefore impeccable and beyond doubt. Lord Atkinson is concise: "What was done on the 16th shows that the person who did it was a person with abnormal propensities of this kind. The possession of the articles [powder puffs and indecent photographs] tends to show that the person who came on the 19th - the prisoner - had abnormal propensities of the same kind. The criminal of the 16th and the prisoner had this feature in common, and it appears to me that the evidence which is objected to afforded some evidence tending to show the probability of the truth of the boys' story as to identity.... This appeal should be dismissed." (T 523).

What is not in issue is the premise derived from the events of March 16. As the judges state, what is not in dispute is that the acts of

March 16 are acts of gross indecency. But Lord Atkinson's impeccable logic begins with more than this - namely, that the acts of gross indecency are the expression of a personality, and moreover, the manifestation of an "abnormal sexual propensity". Gross indecency is equivalent to abnormal sexuality. It is this identity between criminality and abnormal sexuality which allows the logic to take flight: in the domain of sexuality, criminality is abnormality. The rest of the argument works to its inexorable conclusion by reversing the sequential order of the premise: the man on the 19th possesses articles that display abnormality, and since abnormality is criminal, the evidence goes to show that Thompson is a criminal. In short, the premise that the criminal is abnormal is *inverted* to produce the statement that the abnormal is criminal. Whether or not Thompson is *the* criminal is beside the point - the legal apparatus washes its hands of the matter and asserts that all we have to decide is whether the items *tend to confirm* the truth and not whether the items constitute the particular truth that Thompson is the criminal of the 16th. As Lord Sumner remarks, "[t]he question is always not so much what is proved as what it proves. All lawyers recognise as part of their professional premisses that there is all the difference in the world between evidence proving that the accused is a bad man and evidence proving that he is *the* man" (T 527, italics in original).

The law resides in its premises. If the law does not have its abode in the particularity of the truth, we should at least follow the generality of its search for the truth. As suggested, the movement of that search is an inversion. The first step of the inversion is to determine the identity of Thompson - and specifically, his identity as abnormal. This is the so-called factual question. What do the powder-puffs and the indecent

photographs tell the law about Thompson? The judicial answer to this question presupposes an intensive police surveillance of the habits and habitats. Thompson is observed by two policemen not only in terms of where he moves, but also how he moves - according to the evidence of Sergeant Weston, Thompson was seen to "turn around and make a motion of his head at the boys ... crossed the road to where the two boys were standing, entered into conversation with them for a few moments, and then take something from his pocket and hand it to the boys, that he [Weston] then rushed up..." (T 524, per Lord Atkinson). It is also a police search of the body of Thompson which turns up the powder-puffs, and a police search of Thompson's living quarters which produces the photographs. The police evidence is evidence of the body - both items are found on his person, in his possession. Such practices of surveillance are reiterated by the judiciary - not only by their faith in the police accounts, but also quite literally. The comments of the Law Lords display a certain judicial familiarity with the mannerisms of sexually abnormal men. Thus, the Court of Criminal Appeal remarks that "it is well-known to those who have experience of these cases that persons who commit abominable crimes or acts of gross indecency with male persons make use of appliances such as objectionable pictures for the purpose of carrying out their designs" (quoted by Lord Sumner at T 526). The same statement is repeated by Lord Atkinson but in the third person and without attribution: "it is stated that powder-puffs are some of the things with which persons who commit abominable and indecent crimes arm themselves for the purpose of carrying out their criminal designs" (T 525). In short, the possession of powder-puffs and photographs are read as "personal indicia" (T 527, per Lord Sumner) of the identity of Thompson. The monstrosity demonstrated by powder-

puffs and indecent photographs is materialised in a technology of police surveillance and the judicial cognition of the subjects produced by that surveillance. It is as an evidential space of monstration that Thompson is produced as abnormal. It is as such that, in properly sacrificial language, Thompson is offered up to the logic of law. All that is necessary is to spell out that which is already contained in the premises of legal reason - namely, the abnormality of the criminal is the criminality of the abnormal. Presented with a body of evidence, you spell out the tendency of that evidence by turning it into evidence of a tendency. The necessity of legal judgement is to invert the body of evidence into evidence of the body. It is this strange necessity which the notorious remarks of Lord Sumner performs. Since it is the performance that matters I will quote it at length.

The remarks are presented as a translation of a brief statement made in the judgement under appeal. As quoted by Lord Sumner, that statement reads: "ordinary men do not keep indecent photographs of naked boys in their possession. Men who commit the offences charged do ... The man who did the acts on Mar. 16 was a man who would be likely to have such photographs in his possession. The man arrested on the 19th, in fact, had such photographs in his possession in his room." Lord Sumner's translation tracks the monster to its den.....

"The actual criminal made an appointment to meet the same boys at the same time and place three days later and presumably for the same purpose. This tends to show that his act was not an isolated act, but was an incident in the habitual gratification of a particular propensity. The appellant, as his possession of the photographs tends to show, is a

person with the same propensity. Indeed, he went to the place of the appointment with some of the outfit, and he had the rest of it at home. The evidence tends to attach to the accused a peculiarity which, though not purely physical, I think may be recognised as properly bearing that name. Experience tends to show that these offences against nature connote an inversion of normal characteristics, which, while demanding punishment as offending against social morality, also partake of the nature of an abnormal physical property. A thief, a cheat, a coiner, or a house-breaker is only a particular specimen of the genus rogue, and, though, no doubt, each tends to keep to his own line of business, they all alike possess the by no means extraordinary mental characteristic that they propose somehow to get their livings dishonestly. So common a characteristic is not a recognisable mark of the individual. Persons, however, who commit the offences now under consideration, seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialised and extraordinary class, as much as if they carried on their bodies some physical peculiarity." (T 528)

The language of (de)monstration privileges the constative dimension of Lord Sumner's discourse. In doing so, the performative dimension is reduced - the saying is reduced to the said. What is prohibited is the indicia, the hall-marks, the signatures, the stamp. It is "as *if* they carried on their bodies some physical peculiarity". But the prohibition works by a reduction of the hall-marks to a determinate condition. The hall-marks - the powder-puff and the indecent photograph - are produced as expressive manifestations of a socio-personal

condition. It is this reduction of the performative to the constative which institutes the extraordinariness of this class of individuals.

But it is not just a reduction. It is a reduction that is managed by a legal displacement. If the logic of legal reason, as already noted, takes up residence in an inversion, it is perhaps no surprise that the judgement condemns Thompson as an invert. The invert is the displaced figure of legal reason. Moreover, it is a figure necessary to that reason - it is that which makes possible the imaginary legal constitution of a closed space. As a logical space, it is the closure of a tautology: the abnormal is criminal. I have said enough about that. What remains is to trace the closure of the subjective space of the invert, and the closure of the social domain.

The figure of the invert is a symptom of the legal desire for an administrative partition of the social domain. The statement from the lower court which Lord Sumner translates divides the population into the licit and the illicit, into ordinary men and the non-ordinary. Lord Sumner's translation however introduces a modification in this partitioning. Ordinary men are divided into the licit and the illicit, the latter being described as "ordinary men gone wrong". Both of these categories are however normal, and thus to be distinguished from the abnormal, the extraordinary, the monstrous. In short, the fantasy constitutes the social space as the enclosure of the normal, the ordinary, the everyday. But it does so by defining that which is outside, that which is absolutely exterior. To be more precise, the invert is not someone who has simply strayed beyond the limits of society - he is not an ordinary man gone wrong. Rather the space of the invert is a self-enclosed and cohesive

domain, he is a determinate entity with his own peculiar ontology. Thus Lord Atkinson's equivocation posits the invert as a type defined by its own habits and habitat, its own technology and style: "I do not know, and it is not stated, whether they [the photographs] are used to stimulate the depraved lusts of those given to such practices or to corrupt the mind of those whose assistance or sufferance such people seek." (T 525).

The equivocation conjures up two symptomatic images: the invert as auto-erotic, and the invert as corrupter. As auto-erotic, the legal fantasy consigns the invert to a totally self-enclosed space. The possession of indecent photographs is one trait that the law designates as definitive of that space. Another is the fact that Thompson wears make-up. The simulation of the feminine is a dissimulation of the masculine. What stimulates the invert is the dissimulation. The legal anxiety is the fear, the horror, that he is what he appears, that he becomes what he seems. That in conforming himself to the model of the feminine he will become feminine. In short, what is condemned is the confusion of custom and costume. Such confusion is reiterated in Atkinson's equivocation. Atkinson's equivocation allows him to have it both ways, so too the invert is stimulated by having it both ways. It is Atkinson's equivocation which institutes the invert as the equivocal figure of dissimulation. In other words, the invert is the limit of legal reason.

It is however an impossible limit. I have mentioned that the fantasy of legal reason constitutes the enclosure of the normal and the enclave of the abnormal as absolutely exterior to each other. The impossibility of this partition however is symptomatically registered in

the image of the invert as corrupter. No doubt the make-up obtains its resonance in the case report from its association with a corruption of masculinity. But, in order to raise the question of administration, it is a corruption of the "two boys" which I will address.

The two boys - Maunders and Jones - function as figures of the ordinary, the everyday. As figures of innocence, they represent the purity of the normal. They are conjured with "dirty faces" but this dirt is just a surface phenomenon. Nothing that soap and water wouldn't fix. Their faces might be dirty but as children they embody the very image of innocence and purity. It is in this context that the case report displays its anxiety about the invert as one who corrupts, seduces the normal. The discourse of corruption is counterposed to a discourse of public hygiene. Both discourses pivot around the pure interiority of "the boys".

Hygiene is discussed in the formal context of determining the intentionality of the person who possesses powder puffs and indecent photographs. In respect of the powder-puffs, Lord Atkinson mounts a defence against the possibility of corruption: "[h]e could not by them promote the cause of charity or cleanliness; he could not have carried them for such a purpose; the time had not arrived for their use, but can it reasonably be doubted that they were carried to be used when needed?". A similar defence is constructed by Lord Atkinson in respect of the photographs: "they could not be needed for the work of a hygienic enthusiast, so devoted to youthful cleanliness that he gave to two boys he had never met before and who had teased him by staring at him, 2s. to get their dirty faces washed." (T 525).

In this discourse of hygiene, the fantasy of the normal as a closed social space is imaged in the absolute interiority of the child. As corrupter and seducer of the child, the invert is a symptom of this fantasy. In attempting to distinguish the administrative practice of public hygiene from the practices of the seductive and corrupting invert, what is acknowledged is the necessary failure of the administrative and logical partition between the inside and the outside, the child and the invert, the enclosure of the normal and the enclave of the abnormal. The fantasy of law can only propose the interiority of the child on the basis of the priority of its corruption by the exteriority of the invert¹¹⁷. In administrative terms, it is this necessary failure which determines the always necessary hygienic intervention. Always liable to be interrupted, the borders and limits of the normal are policed and patrolled as a defensive strategy. The fantasy of law is a defence of the social.

What I have been tracing is the imaginary constitution of the legal apparatus. It is through fantasy that the law comes to desire. The construction of the fantasy of closure is the condition on which the legal apparatus pursues the defence of the social, the defence of the child, the defence of the norm - a defence *against* the invert. In this sense, the fantasy of innocence is constitutive of the desire of law. But more than this, the invert is a symptom of this fantasy. As symptom, the invert is an effect of a strategy of displacement. The invert is the displaced figure of the impossibility of desire, a figure of the impossible innocence of law. The invert is blamed for this impossibility. The necessary guilt of the invert is a displacement of the impossible innocence of law. As such, the

¹¹⁷ The general point is made concisely by J. Derrida (1988) Limited Inc, p.153: "The outside penetrates and thus determines the inside".

fate of law is to reiterate crime. The condemnation of the invert repeats the taunts buried in Atkinson's fantasy of public hygiene: two boys "who had teased him [a stranger] by staring at him" (T 525). Such is the violence of *this* legal event.

I have spent some time reading Thompson v DPP because it installs a binary opposition between the abnormal and the normal. In this case, the identity of the criminal is that he is abnormal. It is as such that Thompson is continually evoked as the originary case in a long line of cases in the law of similar-fact evidence. In fact, it would not be too far off the mark to say that the law of similar fact evidence is constituted by an interrogation of the symptoms of "abnormal sexual propensities". We should remind ourselves however that the constitutive symptom of Thompson v DPP is the figure of the invert. It is not until 1967 that the law is entranced by the figure of the homosexual. The binary opposition between the normal and the abnormal will have been re-deployed but not without a mutation. With the symptom of the homosexual, the legal apparatus internally divides the enclave of the abnormal. Rather than the singular and unified space of the invert, there will have been the plural and unified space of homosexualities. It is this mutation in the fantasy of law that I address in a reading of the 1974 case, signed as Boardman v DPP.¹¹⁸

118 [1974] 3 All ER 887-906. All further page references to this case report will be given in the body of the text preceded by the initial B.

The Anal Logic Of Judgement

The more one is the master,
the more one presents one's rear.¹¹⁹

In the annals of the law of evidence, the case report of Boardman v DPP is conventionally understood as reforming a line of cases that developed out of Thompson v DPP - a line of cases which, with or without warrant from Thompson, assigned homosexuality to a special class of cases. Let us then note first what Boardman v DPP styles itself as leaving behind. Lord Cross of Chelsea invokes the ordinary man to make his departure: "the attitude of the ordinary man to homosexuality has changed very much even since R v Sims [i.e. 1946] was decided and what was said on that subject in 1917 by Lord Sumner in Thompson v R - from which the view that homosexual offences form a class apart appears to stem - sounds nowadays like a voice from another world." (B 909) Of course, in this distinction, we can read the lineaments of the (extra)ordinary. Instead of the synchronic opposition between the ordinary man and the extraordinary invert of Thompson, there is the diachronic opposition between the ordinary man of today and the otherworldly figure of yesterday. In both instances, the extraordinary does not count - whether as the invert or as the past. Hence, Lord Wilberforce states, in the formal language of pluralism, that "in matters of experience it is for the judge to keep close to current mores. What is striking in one age is normal in another; the perversions of yesterday may be the routine or the fashion of tomorrow." (B 898) And finally, Lord Hailsham of St Marylebone quotes with approval a statement by Lord Reid in DPP v

¹¹⁹ J. Derrida (1987) The Post Card, p. 453

Kilbourne that "there are indications of a special rule for homosexual crimes. If there ever was a time for that, that time is past, and on the view which I take of the law any such rule is quite unnecessary"¹²⁰. In short, it is not that there is no history to the legal classification of homosexual crimes, but that the past does not count. The judgement in Boardman v DPP will not have escaped the past that easily - by fiat, as it were. In the very act of asserting that the past does not count, the judicial mastery of the present will have taken-for-granted the historical formation of the homosexual-in-law. The judges will have been taken from behind. It is on this basis that Boardman v DPP promotes homosexualities.

The case is an appeal against conviction in the Norwich Crown Court. Boardman had been convicted of buggery with a sixteen year old boy named Said, and of inciting another boy - Hamidi - who is seventeen years old, to commit buggery. The condemned man is the headmaster of an English language school in Cambridge. The school caters primarily for boys up to the age of nineteen from Middle Eastern countries. The scene of judgement is the Platonic scene of paederasty. It is a scene of an initiation into the Good and the Beautiful. The good repetition of reality must be distinguished from the bad repetition of reality, the verisimilar from the real. And this discrimination is produced in the pedagogical context of the sage (the prudent one who knows how to master himself) teaching others to master themselves¹²¹. On this

¹²⁰ DPP v Kilbourne [1973] 1 All ER 440 at 456. Quoted in Boardman v DPP, op. cit. at p. 903.

¹²¹ The two great dialogues dealing with *eros* are Plato (1951) The Symposium and (1973) The Phaedrus. For a discussion of the contribution of the Platonic *eros* and male sexuality to the West's discourse of love, see J. Kristeva (1987) Tales of Love pp. 59-83, esp.

pedagogical space, how is the judge to judge? How is the master to display his mastery?

The Good and the Beautiful, the law of the law, is that which falls from the mouths of their Lordships¹²². But as with the past, it is obscure. The foundation of legal rules is not derived from logic but from policy, common sense, experience, and various other clichés for the indeterminate nature of legality (B 902 per Hailsham, B 911 per Simon). Rather it is the rules of evidence which bind the judges. But even here legality remains indeterminate - the rules cannot be codified, closed in advance. "The fact is that, although the categories are useful classes of example, they are not closed ... and they cannot be closed by categorisation" (B 904, per Hailsham; see also B 893 per Morris, B 896 per Wilberforce). There is no underlying code into which the judiciary can be initiated. If there was, the danger is that judges will simply pay "lip service" to that which is comprehensive and restrictive (B 911, per Cross). Such bad repetitions aside however, there is an initiation. The rules of evidence are "guides, but not shackles" (B 905, per Hailsham). The rules of evidence thus function as an intermediary between, on the

62-9. Kristeva notes "Eros is thus homosexual, and homosexuality must be understood, beyond love for *paides*, boys, as an appetite for homologation, for identification of the sexes, under the aegis of an erected ideal. Of the Phallus" (p.62). In contemporary terms, and more polemically, "Read your left liberal newspaper and you will see that Phaedrus and Socrates are among us... Just as addicted to their mania, just as eager for a political or religious ideal ..., just as frenzily feathered, their penes straining to equal the image of a Phallus that must necessarily exist since it draws out delirious spates..." (p.69)

122 See Lord Salmon in *Boardman v DPP* at p.912: "It is plain that what has fallen from your Lordships (with which I respectfully agree) is that the principles stated by Lord Herschell LC are of universal application and that homosexual offences are not exempt from them". The exemption here is not the exemption from criminalisation but refers to the construction of homosexual crimes as a special class of crimes.

one hand, the absence of a code and, on the other, the presence of the "variety of human circumstances [that] is infinite" (B 898, per Hailsham), the plurality of cases and the multiple patterning of facts. The rules of evidence constitute the daemonic space of Eros, that "yearning for fusion with the supreme Good, a yearning at the same time for immortality, this desire for that which is lacking and sends its emanations through the body of the young man"¹²³. The rules of evidence constitute the space of desire as an intermediate space - interpretive, synthetic. In Boardman v DPP, that space is variously nominated as the evidential rules, the jury, commonsense, the experience of the judge. And as we will come to read it is named by the figure of the "catamite" (B900, per Hailsham) - a figure whose archetype is Ganymede, the messenger God, and lover of Zeus. It is this desire of and for the intermediary which constitutes the neutrality of legal reason. It is a protestation which is crucial to the space of judgement and so we should not denounce it too quickly.

The space of judgement is theoretic. It is the hypothe(ore)tic reason of rationalism, a reason that is applied so universally that it captures everything and nothing. It is, in short, a reason that is empty. And it is at this level that legal reason declares its neutrality with respect to homosexuality. The distinctiveness of Boardman v DPP is that, contra Thompson, it declares that homosexual offences are not a special category¹²⁴. This formal declaration in the law of evidence is

¹²³ J. Kristeva (1987) op.cit. p.63

¹²⁴ The judgements contain numerous statements to this effect. A random sampling would note Lord Wilberforce at p.896, Lord Morris at p. 893, Lord Hailsham at p.907, and Lord Hailsham at p. 902 rejecting sodomy as a special category of crime for the purposes of the rules of evidence.

homologous to the formal declaration in criminal law that homosexual acts are no longer a crime. Thus, it is not homosexuality *per se* that the reason of the legal apparatus prohibits. Rather, buggery is the same as burglary - or, more correctly, "in the case of an alleged homosexual offence just as in the case of an alleged burglary, evidence which proves merely that the accused has committed crimes in the past and is therefore disposed to commit the crime charged is clearly inadmissible". Lord Salmon then goes on to remark, in pursuance of this analogy, that "there must be thousands of professional burglars who habitually enter through ground floor windows"(B 913, see also B 916 per Hailsham)¹²⁵. The indistinction, their resemblance, the homologation of the bugger and the burglar is said to reside in their criminality. The burglar and the bugger are the same because they are both criminals - just as the bugger is defined by his habits and habitat, so too the burglar is defined by his *modus vivendi* or, in the language of practical reason, his *modus operandi*. It is on the basis of this analogy that the legal apparatus asserts that it does not prohibit homosexuality *as such*. Proof of a homosexual character, of a homosexual personality, does not prove that the particular act of buggery was committed by the accused who is a homosexual. More concisely, it is as a manifestation of criminality and not as a manifestation of homosexuality that acts of buggery and gross indecency are punished.

125 Compare here the language of habit used in Thompson by Lord Sumner to describe the particularity of the invert. I am also tempted to suggest that the resemblance drawn here between the burglar and the bugger is a suppressed metonymy: the bugger enters the back door, the burglar enters ground floor windows.

This is the hypothoetic principle of neutrality. It can be transcribed into the formula: buggery and gross indecency are only committed by homosexual males and only *some* homosexual males commit buggery and gross indecency. It is to this demarcation - a demarcation *intrinsic* to the class of homosexuals - that the decision in Boardman v DPP is addressed. Whereas in Thompson the abnormality of homosexuality is identical to criminality, the decision in Boardman divides that abnormality into the criminal and the non-criminal. The criminal homosexual is abnormally abnormal; whereas the non-criminal homosexual is normally abnormal. The hypothoetic reason of law posits the criminal homosexual as hyper-abnormality.

What demarcates the criminal homosexual from the non-criminal homosexual? What I will attend to here is the requirement of proof that the principle of neutrality puts into operation. Similar-fact evidence is a sub-species of character evidence - and, usually, evidence of bad character in criminal trials. In formal terms, in order to use such evidence, a similarity must be drawn between a range of different incidents - or, as in Boardman's case, stories told by different witnesses about different incidents which nevertheless can be said to have similar features. In Lord Morris's words, there must be "something more than isolated instances" (B 893). In Lord Hailsham's terms,, there must be "more than a superficial resemblance" (B 900) or, as he puts it later, "the truth is that a mere succession of facts is not normally enough" (B 905). Against what Hailsham calls "the fertility of ingenuity in counsel" (B 898), the judicial reasoning on appeal deploys numerous formulae for the supplement that characterises similar-fact evidence. There must be a "striking similarity", a "striking resemblance", "very striking peculiarities",

a "certain peculiar course of conduct", a "system", an "underlying unity comprehending and governing" the various particular circumstances. In short, a "signature"¹²⁶. Lord Hailsham describes these formula as "highly analogical not to say metaphorical expressions" (B 905).

It is the metaphorical that is put to one side in the analogical. Moreover, it is a repression that is necessary to the operation of legal judgement. It is by such metaphors that legal reason can transport itself from one incident to another: the unity between two disparate incidents is governed by such metaphors. The similarity must be striking, the image produced by legal reason must be a vivid image, the type must be a *hypotyposis*. Hypotyposis is the signature of desire in law, and it is this which is put to one side.

Moreover, the subjective right to punish is a displacement of this signature. What is left behind returns, on the side of the legal subject, as that which has to be punished. What is to be punished on the basis of similar-fact evidence is that which is what is left behind: the particularity of a written mark or devise. Thus, Lord Salmon, elaborating the analogy between the burglar and the bugger, instructs his audience with a "theoretical possibility": "if, for example, A had a long series of convictions for burglary and in every case he had left a distinctive written mark or device behind him and he was then charged with burglary in circumstances in which an exactly similar mark or device was found at

¹²⁶ The various formulae are derived from various cases in the history of the law of similar-fact evidence and reincorporated in the judgements of Boardman. See variously, pp. 893, 894, 895, 897, 905, 906, 911. In logical terms, what is being denominated is the middle term that provide the reasoned fact linking different instances.

the site of the burglary he was alleged to have committed, the similarity between the burglary charged and those of which he had previously been convicted would be so uniquely or strikingly similar that evidence of the manner in which he had committed the previous burglaries would, in law, clearly be admissible against him." (B 913). Lord Hailsham also elaborates the homely example of the burglar's signature as a remainder but, in this instance, that which is left behind is "a humourous limerick" or "an esoteric symbol written in lipstick" (B 906). With such signatures, Hailsham arrives at the distinctiveness of the homosexual criminal: "in a sex case, to adopt an example given in argument in the Court of Appeal, whilst a repeated homosexual act by itself might be quite insufficient to admit the evidence as confirmatory of identity or design, the fact that it was alleged to have been performed wearing the ceremonial head-dress of an Indian chief or other eccentric garb might well in appropriate circumstances suffice." (B 906). Whether it is the head-dress of the person who commits homosexual acts or the full-bottomed wig of the Law Lord, what is forgotten is the desiring body. What is repressed in legal reason is the desire of law: its signatures of desire, whether the full-bottomed wig or the hypotyposis of its argumentive examples. It is this desire which is displaced onto homosexual acts. What is punished is a desire which the law has put there in the first place. What is prohibited is a desire that is properly legal.

The eccentric garb of the homosexual is not only a displacement of the desire of law but also a displacement of the desire of the homosexual body. The legal narrative of evidence produces the signatures of homosexual desire as signatures of the visible. The eccentric garb is produced as the material sign (*stigmata*) of an

absence, a sign of a truth that is absent. Moreover, what is produced as material is not simply the homosexual tendency *per se*. What is materialised as that which is to be judged is a homosexual tendency which expresses itself in a particular form. What the law masters in the signatures is a differentiated homosexuality. Thus, Lord Morris notes that this case is "not merely a straight case of a schoolmaster taking advantage of a pupil and indecently assaulting a pupil" (B 895). Rather, as Lord Wilberforce remarks, "all sexual activity has some form or other and the varieties are not unlimited". He thus notes that a distinction, albeit fine, can be drawn between "'normal' homosexual acts" and homosexual acts which assume "a different and... 'abnormal' pattern" (B897). It remains then to note the signatures - the performance - which identifies Boardman as not just a homosexual but as a criminal homosexual.

The judges spend some time conjuring up the "prosaic details" (B 898) in order to specify not so much the event but that which translates the event into evidence. The event only ever appears in law in as much as it is constituted as distinctive, unusual, peculiar. The recounting of the facts in Boardman is thus a search for what was left behind and it is on that basis that Boardman will have been guilty in advance. What remains of the event and is instituted in the case report are two features. The first, and least significant for the judges, is that Boardman is said to have visited Said and Hamidi in their dormitories and at night. Like the concern with public hygiene in Thompson, this characteristic is equivocal as to Boardman's character. Lord Morris suggests that it might have "merely marked the innocent activity of a zealous schoolmaster whose association with those in his charge and under his care made him

solicitous for their welfare". (B 895). The ambiguity of indication positions Boardman as excessive - and excessive in terms of pedagogic practice. It is simply the intrusion of the sexual into the pedagogic. The second and more decisive feature in which the judiciary invests its reason is one that is not simply excessive but which inverts the oppositions which define the sexual as such - and in particular, the gendered opposition of the active and the passive. This is what Hailsham calls the "'catamite' feature" (B 907).

Let us first note that the differences between the Law Lords. Lord Hailsham is the only judge who firmly asserts that the catamite feature is an unusual and distinctive signature. Lords Cross and Salmon however equivocate - by declaring their lack of knowledge. Lord Cross of Chelsea declares: "It is no doubt unusual for a a middle-aged man to yield to the urge to commit buggery or to try to commit buggery with youths or young men but whether it is unusual for such a middle-aged man to wish to play the pathic rather than the active role I have no idea whatever" (B 912). Buggery is unusual for middle-aged men. That he knows. What he equivocates on is whether the inversion of active and passive is distinctive in and of itself. In other words, he equivocates on whether it is possible to classify buggery into a set of specific types. Lord Salmon declares a similar lack of knowledge. He states that "whenever these unnatural practices are indulged in, someone ex hypothesi is in the active and someone is in the passive role. It may be that it is most unusual for the older man to be in the passive role ... For all I know however, the one may be as unusual as the other" (B 906). Again, an equivocation over the classification of particular types of the general category of buggery. What is at issue in this equivocation is

whether the distinctiveness is to be located in the domain of the sexual or in the domain of the pedagogic. The equivocation allows both Cross and Salmon to argue that what is distinctive is the excessive nature of the homosexual acts in relation to the pedagogical. That is, homosexual acts are judged as a problem of pedagogy and not sexuality. Thus, Salmon describes the departure from the normal pedagogic practice - a practice of which Salmon displays a great deal of knowledge: "Any master who went his rounds at such odd hours and made such a discovery would have told the boys to go back to their own beds immediately and ordered each to come and see him after breakfast. He would not have left until each boy was in his own bed. He would probably also have gone round at least once later to make sure that each boy had remained in his own bed." It is in these terms that Salmon declares Boardman's argument "wholly incredible" (B 906). In short, Boardman's explanation frames the event as a pedagogical problem - a problem of finding two boys together in bed. In responding to this explanation proffered by Boardman, Cross and Salmon also frame the problem as pedagogic and on this basis declare Boardman's behaviour to be a breach of good pedagogic practice.

It is thus left up to Lord Hailsham of St Marylebone to frame the event as a problem of sexuality, as a problem of distinctive sexualities. The stories of Hamidi and Said indicate that this is not your usual buggery but rather that what is being judged is a particular type of buggery. Of this sham, Hailsham is certain. Although he notes that there are other similarities between the stories of Said and Hamidi, he firmly states that the catamite feature is of itself striking, distinctive, a signature of a deviant sexuality - and not just deviant pedagogy. Thus,

"in both cases the invitation to the act and, in Said's case, the act ultimately effected, was one which involved the active role being played by the boy, whilst the appellant adopted a passive, pathic, or catamite role. The invitation was also conveyed in similar language in at least two incidents, since the appellant appears on the evidence to have invited the boy to 'fuck' him and used language to the effect that his role was to be the passive one." (B 901)¹²⁷. In doing so, he confirms the trial judge's summing up in which it is stated that "there was the 'unusual feature' that a grown man attempted to get an adolescent boy to take the male part to the master's passive part in acts of buggery" (B 895). Hailsham's catamite is the site at which the oppositions between the passive and the active, the female and the male, the master and the pupil are inverted. The pedagogue being mastered rather than displaying mastery, the adult being buggered instead of bugging, the master playing a feminine role instead of asserting his masculinity. Hailsham's signature thus returns to the hall-mark of the invert in Thompson. But with a difference: only the homosexual who is an invert is a criminal. Hailsham's preference is for the homosexual who displays the legal image of masculinity, who buggers rather than is buggered. As such, not all homosexuals are criminals: the only homosexual who is criminal is one who acts as *if* he is other than what he is: masculine, heterosexual, master.

127 Compare Hailsham's confession of his response when he himself is put in the passive position of being invited to reproduce: "When I was still single I received a telephone call from a totally unknown woman asking me to become the father of her child. In those days AID had not been invented. I had certainly not heard of AIF or any of the other alternatives. I had only heard of fornication. At any respect, I treated the request as a complement, but I respectfully declined the invitation." Quoted in The Guardian 9 February 1990 from a House of Lords Debate the previous week.

In sum, the achievement of Boardman was to extricate homosexuality from criminality. But it did so at the cost of introducing a distinction between the good homosexual and the bad homosexual. It is in these terms that the Sexual Offences Act 1967 should be understood as a reform of the law. The revision of sodomitical law is a division of the homosexual. In 1974, Boardman's appeal to the House of Lords was dismissed. Seventeen years later, in R v Courtie the classification of homosexuals into the good and the bad, normally abnormal and the abnormally abnormal, the non-criminal and the criminal, was refined such that the class of criminal homosexuals was subdivided into five discrete categories¹²⁸. And it is as such that the trial judge in R v Brown and others, with which this chapter began, can say that he is not conducting a witchhunt against homosexuals but rather prohibiting a sub-species - that type which express their homosexuality in a sado-masochistic form.

It is the form of homosexuality that is at stake. The *performance* of homosexuality constitutes both the object and target of a quite specific practice of liberal governance. That practice will have been to police the image, the form of homosexuality. At the level of its theoretic reason, the legal apparatus demands visible signatures of an invisible truth which is no more than what legal reason puts there in the first place. The effect of such a policing is that homosexuality, like truth, can never speak itself. The performance must always be reduced to the constative, the ethical to ethics. At the level of its practical reason, the legal apparatus also

128 R v Courtie [1984] 1 All ER 740.

polices the image. No flaunting allowed. It calculates the differences within homosexuality, promotes a plurality of forms, and intervenes in order to eliminate the bad form of the homosexual (the gay and the queer) and to incorporate the good form of the homosexual. It is this pluralism which currently captivates the homosexual-in-law.

BIBLIOGRAPHY

The bibliography lists all works cited in the thesis. In addition, and wherever possible, those which constitute the implicit interlocutors have also been included. Case reports of legal decisions are listed in a separate section at the end of the bibliography, as are the miscellaneous newsletters consulted.

- Abbott, F. (ed) (1987) *New Men, New Minds: Breaking Male Tradition*. Freedom, CA: Crossing Press.
- Abraham, N. and Torok, M. (1986) *The Wolf Man's Magic Word: A Cryptonymy*. Translated by N. Rand. Minneapolis.
- Adams, C., Fay, J. and Loreen, M. (1984) *No Is Not Enough*. California: Impact Publishers.
- Adams, P. (1989) "Of Female Bondage", in T. Brennan (ed) *Between Feminism and Psychoanalysis*. London: Routledge.
- (1990) "Representation and Sexuality", in P. Adams and E. Cowie (eds) *The Woman In Question*. London: Verso.
- (1992) "Waiving the Phallus", *Differences* vol. 4, no. 1: 76-83.
- Adams, P. and Cowie, E. (eds) (1992) *The Woman in Question*. London: Verso.
- Adorno, T. and Horkheimer, M. (1986) "Juliette or Enlightenment and Morality", in T. Adorno and M. Horkheimer, *Dialectic of Enlightenment*. 2nd edn. London: Verso.
- Allen, J. (1983) "Marxism and the Man Question: some implications of the patriarchy debate", in J. Allen and P. Patton (eds) *Beyond Marxism? Interventions After Marx*. Leichhardt, Sydney: Intervention Publications.
- (1990) "'The Wild Ones': The Disavowal of Men in Criminology", in R. Graycar (ed) *Dissenting Opinions: Explorations in Law and Society*. Sydney: Allen & Unwin.
- Anonymous (1992) "Woody and Me: a stepfather speaks out about love", *The Guardian* 26 August, p. 29.
- Armstrong, L. (1978) *Kiss Daddy Goodnight*. New York: Hawthorn Press.
- Artaud, A. (1965) *Anthology*. Edited by J. Hirschman. 2nd revised edn. San Francisco: City Lights Books.
- Arts Council of Great Britain (1969) *Obscenity Laws: A Report by the Working Party*. London: Andre Deutsch.
- Ashe, M. and Cahn, N. (n.d.) "Child abuse: a problem for feminist theory". Unpublished Paper.
- Attridge, D. (ed) (1991) *Acts of Literature*. London: Routledge.
- Austin, J. L. (1976) *How To Do Things With Words*. 2nd edn. Oxford: Oxford University Press.
- Bailey, V. and Blackburn, S. (1979) "The Punishment of Incest Act 1908: a case study in law creation", *Criminal Law Review*, pp. 749-64.
- Bailey, V. and McCabe, S. (1979) "Reforming the Law of Incest", *Criminal Law Review*, 708-18.
- Bainham, A. (1988) *Children, Parents and the State*. London: Sweet and Maxwell.
- Bal, M. (1990) "De-disciplining the Eye", *Critical Inquiry* vol. 16 (Spring): 506-31.
- Barrett, M. (1992) *The Politics of Truth: From Marx to Foucault*. Cambridge: Polity.

- Barrett, M. and McIntosh, M. (1982) *The Anti-Social Family*. London: Verso.
- Barthes, R. (1974) *S/Z: An Essay*. Translated by R. Miller. New York: Hill and Wang.
- (1977) *Roland Barthes by Roland Barthes*. Translated by R. Howard. London: Macmillan.
- (1977) *Sade Fourier Loyola*. Translated by R. Miller. London: Jonathan Cape.
- (1979) *A Lover's Discourse: Fragments*. Translated by R. Howard. London: Jonathan Cape.
- (1983) *Empire of Signs*. Translated by R. Howard. London: Jonathan Cape.
- (1984) *Image Music Text*. Translated by S. Heath. London: Fontana.
- (1984) *Camera Lucida: Reflections on Photography*. Translated by R. Howard. London: Flamingo.
- (1986) *The Rustle of Language*. Translated by R. Howard. Oxford: Blackwell.
- Bataille, G. (1979) *Story of the Eye*. Translated by J. Neugroschel. London and Boston: Marion Boyars.
- (1987) *Eroticism*. Translated by M. Dalwood. London: Marion Boyars.
- (1988) *Guilty*. Translated by B. Boone. Venice, CA: Lapis Press.
- Baudrillard, J. (1979) *De La Seduction*. Paris: Editions Galilee.
- (1983) *Simulations*. Translated by P. Foss, P. Patton, and P. Beitchman. New York: Semiotext(e).
- (1987) *Forget Foucault*. New York: Semiotext(e).
- (1988) *Jean Baudrillard: Selected Writings*. Edited and introduced by M. Poster. Cambridge: Polity with Blackwell.
- (1990) *Seduction*. Translated by B. Singer. London: Macmillan.
- Beauvoir, S. de. (1983) *The Second Sex*. Edited and translated by H. M. Parshley. Harmondsworth: Penguin.
- Bell, S. (1988) *When Salem Came To The Boro: The True Story of the Cleveland Child Abuse Crisis*. London: Pan.
- Bennett, F., Campbell, B. and Coward, R. (1981) "Feminists - Degenerates of the Social?", *Power & Politics* no. 3: 83-92.
- Bennett, T. (1992) "Putting Policy Into Cultural Studies", in L. Grossberg, C. Nelson and P. Treichler (eds) *Cultural Studies*. New York: Routledge.
- Bennington, G. (1988) *Lyotard: Writing the Event*. Manchester: Manchester University Press.
- Bentham, J. (1948) *The Principles of Morals and Legislation*. Reprint of 1823 edn. New York: Hafner Press.
- Bentovim, A., Elton, A., Hildebrand, J., Tranter, M. and Vizard, E. (1988) *Child Sexual Abuse Within The Family*. London: Wright.
- Berlant, L. (1988) "The female complaint", *Social Text* no. 19-20: 237-59.
- Bersani, L. (1986) *The Freudian Body: Psychoanalysis and Art*. New York: Columbia University Press.
- (1988) "Is the Rectum a Grave?", in D. Crimp (ed) *AIDS: Cultural Analysis, Cultural Activism*. Cambridge, Mass.: MIT Press.
- Birken, L. (1988) *Consuming Desire: Sexual Science and the Emergence of a Culture of Abundance, 1871-1914*. Ithaca: Cornell University Press.
- Birmingham Women's Liberation Group (1975) Out Of the Pumpkin Shell. Birmingham.

- Blackstone, W. (1765-69) *Commentaries on the Laws of England*. 4 volumes. Facsimile of 1765-69 edn. Chicago: Chicago University Press.
- Blagg, A., Hughes, J. and Wattam, C. (eds) (1989) *Child Sexual Abuse: NSPCC: listening, hearing and validating the experiences of children*. Harlow: Longman.
- Bloch, I. (1958) *Sexual Life In England Past and Present*. Translated by W.H. Forstern. London: Arco and Rodney Book Service.
- Boone, J. and Cadden, M. (eds) (1990) *Engendering Men: The Question of Male Feminist Criticism*. New York: Routledge.
- Booth, W. [General] (1890) *In Darkest England and the Way Out*. London: International Headquarters of the Salvation Army.
- Borch-Jacobsen, M. (1991) "The Freudian Subject, from Politics to Ethics", in E. Cadava et.al. (eds) *Who Comes After the Subject?* London: Routledge.
- Bordieu, P. (1987) "The Force of Law: Toward a Sociology of the Juridical Field", *Hastings Law Journal* vol. 38: 814.
- Braidotti, R. (1987) "Envy, or with your brain and my looks", in A. Jardine and P. Smith (eds) *Men In Feminism*. New York: Methuen.
- (1989) "The politics of ontological difference", in T. Brennan (ed) *Between Feminism and Psychoanalysis*. London: Routledge.
- Bray, A. (1982) *Homosexuality in Renaissance England*. London: Gay Men's Press.
- Bremmer, J. (ed) (1991) *From Sappho to De Sade: Moments in the History of Sexuality*. London: Routledge.
- (1991) "Greek Pederasty and Modern Homosexuality", in J. Bremmer (ed) *From Sappho to De Sade*. London: Routledge.
- Brennan, T. (ed) (1989) *Between Feminism and Psychoanalysis*. London: Routledge.
- Bristow, E.J. (1977) *Vice and Vigilance: Purity Movements in Britain Since 1700*. Dublin: Gill and Macmillan.
- British Journal of Delinquency* (1958) Special issue, vol. 9: On Homosexuality.
- Brittan, A. (1989) *Masculinity and Power*. Oxford: Blackwell.
- Brod, H. (ed) (1987) *The Making of Masculinities: The New Men's Studies*. Boston: Allen & Unwin.
- Brown, B. (1980) "Private Faces in Public Places", *Ideology and Consciousness* no. 7: 3-16.
- (1990) "A Feminist Interest in Pornography: some modest proposals", in P. Adams and E. Cowie (eds) *The Woman in Question*. London: Verso.
- (1990) "Debating Pornography: The Symbolic Dimensions", *Law & Critique* vol. 1 no. 2: 131-54.
- (1991) "Litigating Feminism", *Economy & Society*, vol. 20 no. 4.
- Brown, S. (1992) "Death As Decoration", in A. Richlin (ed) *Pornography and Representation in Ancient Greece and Rome*. New York: Oxford University Press.
- Brown, W. (1991) "Feminist Hesitations, Postmodern Exposures", *Differences* vol. 3, no. 1: 63-84.
- Burchell, G., Gordon, C. and Miller, P. (eds) (1991) *The Foucault Effect: studies in governmentality*. Brighton: Harvester Wheatsheaf.
- Burgin, V., Donald, J. and Caplan, C. (eds) (1986) *Formations of Fantasy*. London: Methuen.
- Burton, R. (1936) *The Anatomy of Melancholy*. London: J.M. Dent & Sons.

- Butler, J. (1987) *Subjects of Desire: Hegelian Reflections in Twentieth Century France*. New York: Columbia University Press.
- (1990) "The Force of Fantasy: Feminism, Mapplethorpe and Discursive Excess", *Differences* vol. 2, no. 2: 105ff.
- (1990) *Gender Trouble: Feminism and the Subversion of Identity*. New York: Routledge.
- Butler, J. and Scott, J. W. (eds) (1992) *Feminists Theorize The Political*. New York: Routledge.
- Cadava, E., Connor, P. and Nancy, J-L. (eds) (1991) *Who Comes After The Subject?* New York: Routledge.
- Califia, P. (1988) "Among Us, Against Us: The New Puritans." in K. Ellis et.al. (eds) *Caught Looking*. Seattle, Wash.: The Real Comet Press.
- Camera Obscura*. Special Issue: *Male Trouble*. no. 17.
- Campbell, B. (1988) *Unofficial Secrets: Child Sexual Abuse: The Cleveland Case*. London: Virago.
- Canadian Advisory Council on the Status of Women (1988) *Pornography: An Analysis of Proposed Legislation*. Brief Presented to the Hon. Ray Hnatyshyn, Minister Of Justice [b 1988-1E]. Ottawa.
- Caplan, P. (ed) (1987) *The Cultural Construction of Sexuality*. London: Routledge.
- Carlson, D., Cornell, D. and Rosenfeld, M. (eds) (1992) *Deconstruction and the Possibility of Justice*. New York: Routledge.
- Carlyle, T. (1904) *Sartor Resartus: The Life and Opinions of Herr Teufelsdröckh*. London: Chapman and Hall.
- Carrigan, T., Connell, R. and Lee, J. (1987) "Towards a New Sociology of Masculinity", in H. Brod (ed) *The Making of Masculinities*. Boston: Allen and Unwin.
- Carter, A. (1979) *The Sadeian Woman: An Exercise in Cultural History*. London: Virago.
- Carty, A. (ed) (1990) *Postmodern Law*. Edinburgh: Academic Press.
- Carty, A. and Mair, J. (1990) "Some Post-modern Perspectives on Law and Society", *Journal of Law and Society*, vol. 17 no. 4.
- Caserio, R. L. (1989) "Supreme Court Discourse vs. Homosexual Fiction", *South Atlantic Quarterly* vol. 88: 267-300.
- Castel, R. (1988) *The Regulation of Madness: The Origins of Incarceration in France*. Translated by W. D. Halls. Cambridge: Polity Press.
- Chadwick, E. (1965, orig. 1842) *The Sanitary Condition of the Labouring Population in England*. Edinburgh: Edinburgh University Press.
- Chaitin, G. D. (1988) "Lacan and the Object of Semiotics", *SubStance*, no. 57: 37-55.
- Chapman, R. and Rutherford, J. (eds) (1988) *Male Order: Unwrapping Masculinity*. London: Lawrence & Wishart.
- Chauncey, G. (1982/83) "From Sexual Inversion to Homosexuality: Medicine and The Changing Conceptualization of Female Deviance", *Salmagundi* nos 58-9: 114-46.
- Chesler, P. (1978) *About Men*. London: Women's Press.
- Chester, G. and Dickey, J. (eds) (1988) *Feminism and Censorship: the current debate*. Bridport, Dorset: Prism Press.
- Cixous, H. (1981) "The Laugh of the Medusa", in E. Marks and I. de Courtivron (eds) *New French Feminisms: An Anthology*. Brighton: Harvester.
- Cixous, H. and Clement, C. (1986) *The Newly Born Woman*. Translated by B. Wing. Manchester: Manchester University Press.

- Clarkson, C. and Keating, H. (1984) *Criminal Law: Text and Materials*. London: Sweet & Maxwell.
- Clover, C. J. (1987) "Her Body, Himself: Gender in the Slasher Film", *Representations*, no. 20: 187-228.
- Cohen, D. (1990) *Being a Man*. London: Routledge.
- Cohen, E. (1989) "Legislating The Norm: from sodomy to gross indecency", *South Atlantic Quarterly* vol. 88 no. 1: 181-217.
- (1990) "Are We (Not) What We Are Becoming? 'Gay' 'Identity', 'Gay Studies', and the Disciplining of Knowledge", in J. Boone and M. Cadden (eds) *Engendering Men: The Question of Male Feminist Criticism*. London: Routledge.
- Coke, E. (1979) *The Institutes of the Laws Of England*. Reprint of the 1628 edn. New York: Garland Publishing.
- Coleman, P. (1984) "Incest: a proper definition reveals the need for a different legal response", *Missouri Law Review* vol. 49: 251.
- Collier, R. (forthcoming) *Family, Law and Masculinity*. London: Routledge.
- Collins, W. (1966) *The Moonstone*. Harmondsworth: Penguin.
- Copjec, J. (1989) "The Orthopsychic Subject: Film Theory and the Reception of Lacan", *October*, no. 49: 53-71.
- Corby, B. (1988) *Working With Child Abuse*. Oxford: Oxford University Press.
- Cornell, D. (1989) "Post-structuralism, the ethical relation and the law", *Cardozo Law Review* vol. 9: 1587ff.
- (1991) *Beyond Accommodation: ethical feminism, deconstruction and the law*. New York: Routledge.
- (1992) "Gender, Sex and Equivalent Rights", in J. Butler and J. Scott (eds) *Feminist Theorize The Political*. New York: Routledge.
- (1992) *The Philosophy of the Limit*. New York: Routledge.
- Cover, R. (1986) "Violence and the Word", *Yale Law Journal* vol. 95: 1601-29.
- Coward, R. (1983) *Patriarchal Precedents: sexuality and social relations*. London: Routledge & Kegan Paul.
- (1987) "Sexuality and Sexual Violence", in Feminist Review (ed) *Sexuality: A Reader*. London: Virago.
- Coward, R. and Ellis, J. (1977) *Language and Materialism: Developments in Semiology and the Theory of the Subject*. London: Routledge & Kegan Paul.
- Cowie, E. (1990) "Woman As Sign", in P. Adams and E. Cowie (eds) *The Woman In Question*. London: Verso.
- (1990) "Fantasia", in P. Adams and E. Cowie (eds) *The Woman In Question*. London: Verso.
- Crane, P. (n.d) *Gays and the Law*. London: Pluto Press.
- Creative Child Press (1985) *It's OK To Say NO!* California: Ayers & James.
- Creet, J. (1991) "Lesbian Sex/Gay Sex: What's the Difference?" *Out/Look*, no. 11: 29-34.
- Crimp, D. (ed) (1988) *AIDS: Cultural Analysis, Cultural Activism*. Cambridge, Mass.: MIT Press.
- Crimp, D., with Rolston, A. (1990) *AidsDemoGraphics*. Seattle: Bay Press.
- Critchley, S. (1992) *The Ethics of Deconstruction: Derrida and Levinas*. Oxford: Blackwell.
- Dale, P. et.al. (1986) *Dangerous Families: assessment and treatment of child abuse*. London: Tavistock.
- Daly, M. (1979) *Gyn/Ecology*. London: Women's Press.

- Davidson, A. (1987) "Sex and the Emergence of Sexuality", *Critical Inquiry* vol. 14: 16-48.
- Day, G. and Bloom, C. (eds) (1988) *Perspectives on Pornography: Sexuality in Film and Literature*. London: Macmillan.
- Dean, M. (1967) "Similar Facts and Homosexual Offences: The Resurrection of Sims", *Criminal Law Review*, 633-44.
- de Certeau, M. (1984) *The Practice of Everyday Life*. Translated by S. Rendall. Berkeley: University of California Press.
- (1986) *Heterologies: Discourse on the Other*. Translated by B. Massumi. Manchester: Manchester University Press.
- de Grazia, E. (1992) *Girls Lean Back Everywhere: The Law of Obscenity and the Assault of Genius*. New York: Random House.
- de Lauretis, T. (1987) "The Female Body and Heterosexual Presumption", *Semiotica* vol. 67, nos. 3/4: 259-79.
- (1989) "The Essence of the Triangle Or, Taking the Risk of Essentialism Seriously: Feminist Theory in Italy, the U.S., and Britain", *Differences* vol. 1, no. 2: 3-37.
- (1991) "Queer Theory: Lesbian and Gay Sexualities: An Introduction", *Differences* vol. 3, no. 2: iii-xviii.
- Deleuze, D. (1989) "Coldness and Cruelty", in G. Deleuze and L. von Sacher Masoch, *Masochism*. Translated by J. McNeil. New York: Zone Books.
- Department of Health (1988) *Protecting Children: A Guide for Social Workers Undertaking a Comprehensive Assessment*. London: HMSO.
- Department of Health and Social Security (1988) *Child Abuse In Cleveland, 1987: Inquiry Report*. London: HMSO.
- de Man, P. (1979) *Allegories of Reading*. New Haven and London: Yale University Press.
- (1983) *Blindness and Insight: Essays in the Rhetoric of Contemporary Criticism*. 2nd edn. London: Methuen.
- Derrida, J. (1974) *Glas*. Paris: Galilee.
- (1976) *Of Grammatology*. Translated by G. Spivak. Baltimore: Johns Hopkins University Press.
- (1979) *Spurs: Nietzsche's Styles*. Translated by B. Harlow. Chicago: University of Chicago Press.
- (1981) *Writing and Difference*. Translated by A. Bass. London: Routledge & Kegan Paul.
- (1981) *Dissemination*. Translated by B. Johnson. Chicago: Chicago University Press.
- (1981) *Positions*. Translated by A. Bass. London: Athlone Press.
- (1981) "The Law of Genre", in W.J.T. Mitchell (ed) *On Narrative*. Chicago: University of Chicago Press.
- (1982) *Margins of Philosophy*. Translated by A. Bass. Brighton: Harvester.
- (1984) "Deconstruction and the Other", in R. Kearney (ed) *Dialogues with Continental Thinkers: The Phenomenological Heritage*. Manchester: Manchester University Press.
- (1985) *The Ear of the Other: Otobiography, Transference, Translation*. Edited by C. McDonald. Lincoln: University of Nebraska Press.
- (1985) "Prejuges Devant La Loi", in J. Derrida et.al., *La Faculte de Juger*. Paris: Editions de Minuit.
- (1986) *Glas*. Translated by J. Leavey and R. Rand. Lincoln: University of Nebraska Press.
- (1986) "Acts", in *Memoires for Paul de Man*. Translated by C. Lindsay, J. Culler and E. Cadava. New York: Columbia University Press.

- (1987) *The Post Card: From Socrates to Freud and Beyond*. Translated by A. Bass. Chicago: University of Chicago Press.
- (1988) *Limited Inc*. Evanston: Northwestern University Press
- (1989) *Of Spirit: Heidegger and the Question*. Translated by G. Bennington and R. Bowlby. Chicago: University of Chicago Press.
- (1990) "Force of Law: the mystical foundation of authority", *Cardozo Law Review* vol. 11: 919-1046.
- (1991) "Jacques Derrida: An Interview", in R. Mortley, *French Philosophers in Conversation*. London: Routledge.
- (1991) "'Eating Well,' or the Calculation of the Subject: An Interview with Jacques Derrida", in E. Cadava et.al. *Who Comes After The Subject?* London: Routledge.
- (1991) *Between The Lines: A Derrida Reader*. Edited by P. Kamuf. New York: Harvester Wheatsheaf.
- Devlin, P. (1966) "Letter to the Editor". *Criminal Law Review*, 295.
- (1968) *The Enforcement of Morals*. London: Oxford University Press.
- Doane, J. and Hodges, D. (1987) *Nostalgia and Sexual Difference: The Resistance to Contemporary Feminism*. New York: Methuen.
- Doane, M. A. (1991) *Femmes Fatales: Feminism, Film Theory and Psychoanalysis*. London: Routledge.
- Dollimore, J. (1986) "Homophobia and Sexual Difference", *Oxford Literary Review* vol. 8, no. 1/2: 5-12.
- Donzelot, J. (1980) *The Policing of Families: Welfare versus the State*. Translated by R. Hurley. London: Hutchinson.
- Douzinan, C., Warrington, R. and McVeigh, S. (1992) *Postmodern Jurisprudence: The Law of the Text in the Texts of Law*. London: Routledge.
- Douzinan, C. and McVeigh, S. (1992) "The Tragic Body: the inscription of autonomy in medical ethics and law", in S. McVeigh and S. Wheeler (eds) *Law, Health and Medical Regulation*. Aldershot: Dartmouth.
- Downs, D. A. (1989) *The New Politics of Pornography*. Chicago: Chicago University Press.
- Driver, E. (1986) "Just Another Child Abuse?", *Marxism Today*. March: 20-2.
- Driver, E. and Droisen, A. (1989) *Child Sexual Abuse*. London: Macmillan.
- Durkheim, E. (1963) *Incest: The Nature and Origin of the Taboo*. Edited and translated by A. Ellis. New York: Lyle Stuart.
- Dworkin, A. (1981) *Pornography: men possessing women*. London: Women's Press.
- Dworkin, R. (1986) *Law's Empire*. London: Fontana.
- Eardley, T., Humphries, M., Morrison, P. and Hughes, M. (1983) *About Men*. London: Broadcasting Support Services.
- East, E. H. (1803) *A Treatise of the Pleas of the Crown*. 2 volumes.
- Easthope, A. (1986) *What A Man's Gotta Do: The Masculine Myth in Popular Culture*. London: Paladin/Grafton.
- Eddy, J. (1956) "The Law and Homosexuality", *Criminal Law Review*, 22-5.
- Edelman, B. (1979) *Ownership of the Image: elements for a marxist theory of law*. Translated by E. Kingdom. London: Routledge & Kegan Paul.
- Edelman, L. (1989) "At Risk in the Sublime: The Politics of Gender and Theory", in L. Kauffman (ed) *Gender and Theory*. Oxford: Blackwell.

- (1990) "Redeeming The Phallus: Wallace Stevens, Frank Lettrichia, and the Politics of (Hetero)Sexuality", in J. Boone and M. Cadden (eds) *Engendering Men: The Question of Male Feminist Criticism*. London: Routledge.
- Edwards, S. (1991) "Obscenity: A Plea for Censorship," *New Law Journal*, 1st November, pp 1478-80.
- Ehrenreich, B. (1983) *The Hearts of Men: American Dreams and the Flight from Commitment*. London: Pluto Press.
- Eisenstein, Z. R. (1988) *The Female Body and the Law*. Berkeley: University of California Press.
- Elliott, M. (1985) *Preventing Child Sexual Abuse*. London: Bedford Square Press.
- Ellis, H. (1933) *Psychology of Sex: A Manual for Students*. London: Heinemann.
- (1939) *Morals, Manners and Men*. London: C.A. Watts & Co.
- (1959) *Psychology of Sex*. London: Pan Books.
- Ellis, J. (1980) "Photography /Pornography/ Art/ Pornography", *Screen* vol. 21, no. 1: 81-108.
- Engels, F. (1969, orig. 1892) *The Condition of the Working Class in England: from personal observation and authentic sources*. London: Granada/Panther.
- Ennew, J. (1986) *The Sexual Exploitation of Children*. Cambridge: Polity Press.
- Everywoman Collective (ed) (1988) *Pornography and Sexual Violence: Evidence of the Links*. London: Everywoman.
- Fabb, N., Attridge, D., Durant, A. and MacCabe, C. (eds) *The Linguistics of Writing: Arguments Between Language and Literature*. Manchester: Manchester University Press.
- Farrell, W. (1974) *The Liberated Man*.
- Feher, M. (ed) (1989) *Fragments For A History of The Human Body: Parts I-IV*. New York: Zone Books.
- Feldstein, R. and Sussman, H. (eds) (1990) *Psychoanalysis And...* New York: Routledge.
- Feminist Review (ed) (1987) *Sexuality: A Reader*. London: Virago.
- Feminist Review (1988) Special Issue, no. 28: *Family Secrets: Child Sexual Abuse*.
- Feminists Against Censorship (1991) *Pornography and Feminism: The Case Against Censorship*. Edited by G. Rodgeron and E. Wilson. London: Lawrence & Wishart.
- Ferguson, F. (1991) "Sade and the Pornographic Legacy", *Representations* no. 36: 1-21.
- Fernbach, D. (1981) *The Spiral Path: A Gay Contribution to Human Survival*. London: Gay Men's Press.
- Fish, S. (1987) "Withholding The Missing Portion: power, meaning and persuasion in Freud's *The Wolf Man*", in N. Fabb, D. Attridge, A. Durant and C. MacCabe (eds) *The Linguistics of Writing: arguments between language and literature*. Manchester: Manchester University Press.
- Fitzpatrick, P. (1992) *The Mythology of Modern Law*. London: Routledge.
- Fletcher, G. (1976) "The Metamorphosis of Larceny." *Harvard Law Review* vol. 89, no. 3: 469-530.
- (1978) *Rethinking Criminal Law*. New York: Brown, Little.
- Flower MacCannell, J. (1991) *The Regime of the Brother: After the Patriarchy*. London: Routledge.
- Flugel, J. (1930) *The Psychology of Clothes*. London: Hogarth Press.

- Forward, S. with Buck, C. (1981) *Betrayal of Innocence: Incest and Its Devastation*. Harmondsworth: Penguin.
- Foster, A. (1988) *Behold the Man: The Male Nude in Photography*. Edinburgh: Stills Gallery.
- Foucault, M. (1974) *The Order of Things: An Archaeology of the Human Sciences*. London: Tavistock.
- (1974) *The Archaeology of Knowledge*. London: Tavistock.
 - (1979) *Discipline and Punish: The Birth of the Prison*. Translated by A. Sheridan. Harmondsworth: Peregrine.
 - (1980) *Language, Counter-Memory, Practice*. Edited by D. Bouchard. Ithaca, NY: Cornell University Press.
 - (1980) *Power/Knowledge*. Edited by C. Gordon. Brighton: Harvester Press.
 - (ed) (1980) *Herculin Barbin: Being the recently discovered memoirs of a 19th century hermaphrodite*. Brighton: Harvester.
 - (1981) *The History of Sexuality, Volume One: An Introduction*. Translated by R. Hurley. Harmondsworth: Pelican.
 - (1986) *The Use of Pleasure*. Translated by R. Hurley. Harmondsworth: Viking Penguin.
 - *Foucault Live*. Translated by J. Johnston. New York: Semiotext(e).
 - (1990) *Politics, Philosophy, Culture*. Edited by L. Kritzman. New York: Routledge.
 - (1991) "Governmentality", in G. Burchell et.al. (eds) *The Foucault Effect: studies in governmentality*. Brighton: Harvester Wheatsheaf.
 - (1991) "What Is Enlightenment?", in P. Rabinow (ed) *The Foucault Reader*. Harmondsworth: Penguin.
 - (n.d) "An Interview - Sex, Power and the Politics of Identity - by B. Gallagher and A. Wilson", *Edinburgh Review*, no. 69: 52-9.
- Foucault, M. and Blanchot, M. (1987) *Foucault/Blanchot*. New York: Zone Books.
- Foucault, M. and Sennett, R. (1982) "Sexuality and Solitude", *Humanities in Review* vol. 1: 3-21.
- Franzway, S., Court, D. and O'Connell, R. (1989) "Sexual Violence", in S. Franzway et.al., *Staking A Claim: feminism, bureaucracy and the state*. Cambridge: Polity.
- Fraser, N. (1985-6) "On the Political and the Symbolic: Against the Metaphysics of Textuality", *Boundary 2* vol. 14, nos. 1-2: 195-209.
- Freedberg, D. (1989) *The Power of Images: Studies in the History and Theory of Response*. Chicago: Chicago University Press.
- Freud, A. (1981) "A Psychoanalyst's View of Sexual Abuse By Parents", in P. Mrazek and C. Kempe (eds) *Sexually Abused Children and Their Families*. Oxford: Pergamon Press
- Freud, S. (1938) *Totem and Taboo*. Harmondsworth: Pelican.
- (1946) "The Ascertaining of Truth in Courts of Law", in S. Freud, *Collected Papers Volume II*. Translated by J. Riviere. International Psycho-Analytical Library no. 8. London: Hogarth.
 - (1973) *Introductory Lectures on Psychoanalysis*. Pelican Freud Library, no. 1. Harmondsworth: Penguin.
 - (1975) *The Psychopathology of Everyday Life*. Pelican Freud Library no. 5. Harmondsworth: Penguin.
 - (1977) *Case Histories 1: Dora and Little Hans*. Pelican Freud Library, no. 8. Harmondsworth: Penguin.
 - (1977) *On Sexuality*. Pelican Freud Library no. 7. Harmondsworth: Penguin.

- (1985) *The Complete Letters of Sigmund Freud to Wilhelm Fliess, 1887-1904*. Translated and edited by J. M. Masson. Cambridge, Mass.: Harvard University Press.
- (1991) *Case Histories II: Rat Man, Schreber, Wolf Man, Female Homosexuality*. Pelican Freud Library, no. 9. Harmondsworth: Penguin.
- (1991) *Civilisation, Society and Religion*. Pelican Freud Library no. 12. London: Penguin.
- Frow, J. (1987) "The Subject of Law", in G. Wickham (ed) *Social Theory and Legal Politics*. Sydney: Local Consumption Publications.
- Fuss, D. (1988) *Essentially Speaking*. London: Routledge.
- (ed) (1991) *Inside/Out: Lesbian Theories, Gay Theories*. London: Routledge.
- Gagnon, J. (1988) *Pornography in the Urban World*. Montreal: Art Metropole.
- Gallagher, C. (1984) "The Politics of Culture and the Debate Over Representation", *Representations*, no. 5: 115-47.
- (1986) "The Body Versus the Social Body in the Works of Thomas Malthus and Henry Mayhew", *Representations*, no. 14: 83-106.
- Gallop, J. (1982) *The Daughter's Seduction: Feminism and Psychoanalysis*. London: Cornell University Press.
- (1985) *Reading Lacan*. London: Cornell University Press.
- (1988) *Thinking Through the Body*. New York: Columbia University Press.
- (1992) *Around 1981: Academic Feminist Literary Theory*. London: Routledge.
- Gardiner, J. (1992) "Murder: With Gay Abandon", *Socio-Legal Bulletin*, no. 6: 25-6.
- Garland, D. (1981) "The Birth of the Welfare Sanction", *British Journal of Law and Society* vol. 8 no. 1: 29-45.
- (1985) "The Criminal and His Science", *British Journal of Criminology*, vol. 25: 109-37.
- Genet, J. (1967) *A Thief's Journal*. Translated by A. Blond. Harmondsworth: Penguin.
- (1989) *Prisoner of Love*. Translated by B. Bray. London: Picador.
- Gerard, K. and Hekma, G. (eds) (1988) *The Pursuit of Sodomy: Male Homosexuality in Renaissance and Enlightenment Europe*. Special Issue of *Journal of Homosexuality*, vol. 15 nos. 1-2.
- Girard, R. (1978) *Violence and the Sacred*. Translated by P. Gregory. Baltimore: Johns Hopkins University Press.
- Glaser, D. and Frosh, S. (1988) *Child Sexual Abuse*. London: Macmillan.
- Goffman, E. (1979) *Gender Advertisements*. London: Macmillan.
- (1986) *Frame Analysis: An Essay On The Organisation of Experience*. 2nd edition. Boston: Northeastern University Press.
- (1987) "The Arrangement Between the Sexes", in M. J. Deegan and M. R. Hill (eds) *Women and Symbolic Interaction*. Boston: Allen & Unwin.
- Goldstein, A. (1988) "History, Homosexuality and Political Values: searching for the hidden determinants of *Bowers v Hardwick*", *Yale Law Journal* vol. 97: 1073-1110.
- Goodich, M. (1979) *The Unmentionable Vice: homosexuality in the later medieval period*. Oxford: Clio.
- Goodrich, P. (1990) *Languages of Law: From Logics of Memory to Nomadic Masks*. London: Weidenfeld and Nicolson.

- (1991) "Eating Law: Commons, Common Land, Common Law", *Journal of Legal History* vol. 12, no. 3: 246-67.
- (1992) "Critical Legal Studies in England: Prospective Histories", *Oxford Journal of Legal Studies* vol. 12: 195ff.
- (1992) "Fate As Seduction: The Other Scene of Legal Judgement", in A. Norrie and J. Macahery (eds) *Closure or Critique*. Edinburgh: Edinburgh University Press.
- (forthcoming) "Gynaetopia: An Essay on Early Legal Feminism".
- (forthcoming) "Sleeping With The Enemy: An Essay On The Politics of Critical Legal Studies in America".
- Gordon, C. (1991) "Governmentality: An Introduction", in G. Burchell et.al. (eds) *The Foucault effect: studies in governmentality*. Brighton: Harvester Wheatsheaf.
- Goux, J.-J. (1990) *Symbolic Economies: After Marx and Freud*. Translated by J. Gage. Ithaca: Cornell University Press.
- (1992) "The Phallus: Masculine Identity and the 'Exchange of Women'", *Differences* vol.4, no. 1: 40-75.
- Graycar, R. (ed) (1990) *Dissenting Opinions: Feminist Explorations in Law and Society*. Sydney: Allen & Unwin.
- Greenberg, D. F. (1989) *The Construction of Homosexuality*. Chicago: Chicago University Press.
- Griffin, S. (1981) *Pornography and Silence: Culture's Revenge Against Nature*. London: Women's Press.
- Griffiths, M. and Whitford, M. (eds) (1988) *Feminist Perspectives in Philosophy*. London: Macmillan.
- Grossberg, L., Nelson, C. and Treichler, P (eds) (1992) *Cultural Studies*. New York: Routledge.
- Grosz, E., Threadgold, T., Kelly, D., Cholodenko, A. and Colless, E. (eds) (1986) *Futur*Fall: Excursions Into Postmodernity*. Sydney: Power Institute of Fine Arts.
- Guattari, F. (1984) *Molecular Revolution: Psychiatry and Politics*. Harmondsworth: Penguin.
- Gubar, S. and Hoff, J. (eds) (1989) *For Adult Users Only: The Dilemma of Violent Pornography*. Bloomington and Indianapolis: Indiana University Press.
- Gunew, S. (1987) "Male Sexuality: Feminist Interpretations", *Australian Feminist Studies* no. 5: 71-84.
- Hachamovitch, Y. (forthcoming) "Legislating Phantasms", *Cardozo Law Review*.
- Hacking, I. (1991) "The Making and Molding of Child Abuse", *Critical Inquiry* no. 17: 253-88.
- (1991) "Multiple Personality Disorder and Its Hosts", *History of the Human Sciences* vol. 5: 3-31.
- (1991) "Two Souls in One Body", *Critical Inquiry*, vol. 17: 838-67.
- Hall, L. (1991) *Hidden Anxieties: Male Sexuality, 1900-1950*. Cambridge: Polity.
- Hall Williams, J. (1973) "Incest In English Law", in H. Maisch, *Incest*. London: Andre Deutsch.
- (1974) "The Neglect of Incest: a criminologists's view", *Medicine, Science and the Law* vol. 14: 64-7.
- Halley, J. E. (1991) "Misreading Sodomy: A Critique of the Classification of 'homosexuals' in Federal Equal Protection Law", in J. Epstein and K. Straub (eds) *Body Guards: The Cultural Politics of Gender Ambiguity*. London: Routledge.
- Halperin, D. (1990) *One Hundred Years of Homosexuality*. London: Routledge.

- Halperin, D., Winkler, J. and Zeitlin, Z. (eds) (1990) *Before Sexuality: The Construction of Erotic Experience in the Ancient World*. Princeton: Princeton University Press.
- Hart, H.L.A. (1961) *The Concept of Law*. Oxford: Clarendon Press.
- (1968) *Law, Liberty and Morality*. London: Oxford University Press.
- Harvey, A. (1978) "Prosecutions for sodomy in England at the beginning of the nineteenth century", *The Historical Journal* vol. 21 no. 4: 939-48.
- Hayden White (1980) "The Value of Narrativity in the Representation of Reality", *Critical Inquiry* vol.7, no.1: 5-27.
- Hearn, J. (1983) *Birth and Afterbirth: A Materialist Account*. London: Achilles Heel.
- (1987) *The Gender of Oppression: Men, Masculinity, and the Critique of Marxism*. Brighton: Wheatsheaf.
- (1988) "Child Abuse: violences and sexualities towards young people", *Sociology* vol. 22 no. 4: 531-44.
- (1990) "State Organisations and Men's Sexuality in the Public Domain, 1870-1920", in L. Jameson and H. Carr (eds) *State, Private Life and Political Change*. London: Macmillan.
- (1992) *Men in the Public Eye: The Construction and Deconstruction of Public Men and Public Patriarchies*. London: Routledge.
- Hearn, J. and Morgan, D. (eds) (1990) *Men, Masculinities and Social Theory*. London: Unwin Hyman.
- Heath, S. (1978) "Difference", *Screen* vol. 19, no. 3: 50-112.
- (1979) "The Turn of the Subject", *Cine-Tracts* vol.2, no. 3/4: 32-48.
- (1982) *The Sexual Fix*. London: Macmillan.
- (1987) "Male Feminism", in A. Jardine and P. Smith (eds) *Men In Feminism*. New York: Methuen.
- Hegel, G. (1977) *Phenomenology of Spirit*. Translated by A. V. Miller. Oxford: Oxford University Press.
- Hekma, G. (1991) "A History of Sexology: Social and Historical Aspects of Sexuality", in J. Bremner (ed) *From Sappho to De Sade*. London: Routledge.
- Hepworth, M. and Turner, B (1982) *Confession: Studies in Deviance and Religion*. London: Routledge and Kegan Paul.
- Herman, J. and Hirschman, L. (1977) "Father-Daughter Incest", *Signs* vol. 2: 735-56.
- Herman, J. with Hirschman, L. (1981) *Father-Daughter Incest*. Cambridge, Mass.: Harvard University Press.
- Hertz, N. (1983) "Medusa's Head: Male Hysteria Under Political Pressure", *Representations*, no. 4: 27-54.
- (1983) "Reply to Catherine Gallagher and Joel Fineman. More About 'Medusa's Head'", *Representations* no. 4: 63-72.
- Hillis Miller, J. (1987) *The Ethics of Reading*. New York: Columbia University Press.
- Hirst, P. (1979) *On Law and Ideology*. London: Macmillan.
- (1986) "Law and sexual difference", *Oxford literary Review* vol. 8, nos 1-2: 193-7.
- Hobbs, C. and Wynne, J. (1986) "Buggery in Childhood - a common symptom of child abuse", *The Lancet*, 4 October, 792-6.
- Hocquenghem, G. (1978) *Homosexual Desire*. London: Allison & Busby.
- Hoff, J. (1989) "Why Is There No History of Pornography?", in S. Gubar and J. Hoff (eds) *For Adult Users Only: The Dilemma of Violent Pornography*. Bloomington and Indianapolis: Indiana University Press.

- Hollway, W. (1987) "'I just wanted to kill a woman'. Why? The Ripper and Male Sexuality", in Feminist Review (ed) *Sexuality: A Reader*. London: Virago.
- Home Office (1979) *Sexual Offences: consent and sentencing*. London: Home Office.
- Howard League Working Party (1985) *Unlawful Sex: Offences, Victims and Offenders in the Criminal Justice System of England and Wales*. London: Waterlow Publishers.
- Hunt, A. (1992) "Foucault's Expulsion of Law: Towards a Retrieval", *Law and Social Inquiry* vol 17.
- Hunter, I. (1988) *Culture and Government: the emergence of literary education*. London: Macmillan.
- (1992) "Aesthetics and Cultural Studies", in L. Grossberg et.al (eds) *Cultural Studies*. New York: Routledge.
- Hunter, I., Saunders, D. and Williamson, D. (1987) "Obscenity, Literature and The Law", in G. Wickham (ed) *Social Theory and Legal Politics*. Sydney: Local Consumption Publications.
- Hyde, H. (1972) *The Other Love*. London.
- Irigaray, L. (1983) *La Croyance Meme*. Paris: Galilee.
- (1984) *Ethique de la Difference Sexuelle*. Paris: Editions de Minuit.
- (1985) "Is the Subject of Science Sexed?" Translated by E. Oberle. *Cultural Critique* vol. 1: 73-88.
- (1985) *This Sex Which Is Not One*. Translated by C. Burke and C. Porter. Ithaca, NY: Cornell University Press.
- (1986) *Speculum of the Other Woman*. Translated by G. Gill. Ithaca, NY: Cornell University Press.
- (1987) "A Chance of Life: Limits to the Concepts of the Neuter and the Universal in Science and Knowledge." Unpublished Paper presented at Department of Social and Political Science, University of Cambridge.
- (1991) *Marine Lover: Of Friedrich Nietzsche*. Translated by G. Gill. New York: Columbia University Press.
- Jackson, B. (1979) "Towards An Integrated Approach To Criminal Law: Fletcher's Rethinking Criminal Law", *Criminal Law Review* 621.
- Jackson, B. (1988) *Law, Fact and Narrative Coherence*. Liverpool: Deborah Charles.
- Jackson, E. (1992) "Catherine MacKinnon and Feminist Jurisprudence: A Critical Appraisal", *Journal of Law and Society* vol. 19, no. 2: 195-213.
- Jansen, S. (1991) *Censorship: The Knot That Binds Power and Knowledge*. New York: Oxford University Press.
- Jardine, A. (1985) *Gynesis: Configurations of Woman and Modernity*. Ithaca and London: Cornell University Press.
- Jardine, A. and Smith, P. (eds) (1987) *Men in Feminism*. New York: Methuen.
- Jeffery-Poulter, S. (1991) *Peers, Queers and Commons: The Struggle for Gay Law Reform from 1950 to the Present*. London: Routledge.
- Jeffreys, S. (1990) *Anticlimax: a feminist perspective on the sexual revolution*. London: Women's Press.
- Kafka, F. (1953) *The Trial*. Harmondsworth: Penguin.
- (1983) "At the door of the law", in F. Kafka, *Stories 1904-1924*. Translated by J. A. Underwood. London: Futura.
- (1983) "In the Penal Colony", in F. Kafka, *Stories 1904-1924*. Translated by J.A. Underwood. London: Futura.
- Kant, I. (1933) *Critique of Pure Reason*. Translated by N. Kemp Smith. London: Macmillan.

- (1956) *Critique of Practical Reason*. Indianapolis: Bobbs Merrill.
- (1991) *The Critique of Judgement*. Translated by J. Meredith. Oxford University Press.
- (1991) *The Metaphysic of Morals*. Translated by M. Gregor. Cambridge: Cambridge University Press
- (1991) "An Answer to the Question: 'What Is Enlightenment?'" in I. Kant, *Political Writings*. Edited by H. Reiss. Translated by H. Nisbet. 2nd edn. Cambridge: Cambridge University Press.
- Kaplan, E. (1987) "Pornography And/As Representation", *Enclitic* vol. 9 no. 1/2: 8ff.
- Kappeler, S. (1986) *The Pornography of Representation*. Cambridge: Polity.
- Kaufman, L. (ed) (1988) *Gender & Theory: Dialogues on Feminist Criticism*. Oxford: Blackwell.
- Kaufmann, S. (1957) *The Philanderer*. Harmondsworth: Penguin.
- Kendrick, W. (1987) *The Secret Museum: Pornography in Modern Culture*. New York: Viking.
- Kennedy, D. (1979) "The Structure of Blackstone's Commentaries", *Buffalo Law Review* vol. 28: 205-382.
- Kimmel, M. (ed) (1987) *Changing Men: New Directions in Research on Men and Masculinity*. Newbury Park, CA: Sage.
- Kingman, S. (1992) "Nature, not nurture?" *The Independent*, 4 October, pp. 56-7.
- Knight, R.P. (1808) *An Inquiry Into The Symbolical Language of Ancient Art and Mythology*. London.
- Kofman, S. (1985) *The Enigma of Woman: Woman in Freud's Writings*. Translated by C. Porter. Ithaca: Cornell.
- (1987) "Nietzsche and the Obscurity of Heraclitus", *Diacritics* vol. 17, no. 3: 39-55.
- Krafft-Ebing, R. von (1920) *Psychopathia Sexualis, with special reference to the contrary sexual instinct*. 7th and enlarged edition. Translated by C. Chaddock. Philadelphia: F. A. Davis Publishers.
- Kramer, M. (1991) *Legal Theory, Political Theory and Deconstruction: Against Rhadamanthus*. Bloomington: Indiana University Press.
- Krell, D. (1986) *Postponements: Woman, Sensuality, and Death in Nietzsche*. Bloomington: Indiana University Press.
- Krell, D. and Wood, D. (eds) (1988) *Exceedingly Nietzsche: Aspects of Contemporary Nietzsche Interpretation*. London, Routledge.
- Kristeva, J. (1982) *Powers of Horror*. Translated by L. Roudiez. New York: Columbia University Press.
- (1987) *Tales of Love*. Translated by L. Roudiez. New York: Columbia University Press.
- Kroker, A. and Kroker, M. (eds) (1988) *Body Invaders: Sexuality and the Postmodern Condition*. London: Macmillan.
- (eds) (1991) *The Hysterical Male: New Feminist Theory*. London: Macmillan.
- Krupnick, M. (ed) (1987) *Displacement: Derrida and After*. Bloomington: Indiana University Press.
- Kuhn, A. (1984) "Public Versus Private: The Case of Indecency and Obscenity", *Leisure Studies* no. 3: 53-65.
- (1985) "Lawless Seeing", in A. Kuhn, *The Power of the Image: essays on representation and sexuality*. London: Routledge & Kegan Paul.
- Lacan, J. (1979) *The Four Fundamental Concepts of Psycho-Analysis*. Translated by A. Sheridan. Harmondsworth: Penguin.
- (1980) *Ecrits: A Selection*. Translated by A. Sheridan. London: Tavistock.

- (1981) *Speech and Language in Psychoanalysis*. Translated by A. Wilden. Baltimore: Johns Hopkins University Press.
- (1982) "God and The Jouissance of The Woman", in J. Mitchell and J. Rose (eds) *Feminine Sexuality: Jacques Lacan and the Ecole Freudienne*. Translated by J. Rose. London: Macmillan.
- Lacan, J. (1987) "Television", *October* no. 40 (spring) 7ff.
- (1988) *The Seminar of Jacques Lacan Book II: The Ego in Freud's Theory and in the Technique of Psychoanalysis 1954-55*. Edited by J-A. Miller. Translated by S. Tomaselli. Cambridge: Cambridge University Press.
- (1988) *The Seminar of Jacques Lacan Book I: Freud's Papers on Technique 1953-54*. Edited by J-A. Miller. Translated by J. Forrester. Cambridge: Cambridge University Press.
- (1989) "Kant with Sade", *October* no. 51: 55-104.
- Lacey, N, Wells, C. and Meure, D. (1990) *Reconstructing Criminal Law*. London: Weidenfeld and Nicolson.
- Laclau, E. (1983) "The Impossibility of Society", *Canadian Journal of Political and Social Theory* vol. 7, nos. 1-2: 21-4.
- Laclau, E. (1988) "Politics and the Limits of Modernity", in A. Ross (ed) *Universal Abandon? The Politics of Postmodernism*. Minneapolis: University of Minnesota Press.
- Laclau, E. and Mouffe, C. (1986) *Hegemony and Socialist Strategy*. London: Verso.
- Lacombe, D. (1988) *Ideology and Public Policy: The Case Against Pornography*. Toronto: Garamond Press.
- Lafitte, F. (1958) "Homosexuality and the Law", *British Journal of Delinquency* no. 9: 8-19.
- Land, N. (n.d.) "Kant, Capital, and the Prohibition of Incest", *Third Text* no. 5: 83-94.
- Laplanche, J. and Pontalis, J-B. (1986) "Fantasy and the Origins of Sexuality", in V. Burgin et.al. (eds) *Formations of Fantasy*. London: Methuen.
- Laqueur, T. (1990) *Making Sex: Body and Gender from the Greeks to Freud*. Cambridge, Mass.: Harvard University Press.
- Leach, M. (1975) *I Know It When I See It*. Philadelphia: Westminster Press.
- Le Doeuff, M. (1989) *The Philosophical Imaginary*. Translated by C. Gordon. London: Athlone Press.
- Legendre, P. (1989) *Le Crime du Caporal Lortie: traite sur le Pere*. Paris: Fayard.
- (1990) "The Lost Temporality of Law", *Law and Critique*, vol. 1 no. 1.
- Lehman, P. (1988) "In The Realm of the Senses: Desire, Power and the Representation of the Male Body", *Genders* no. 2 (summer): 91-110.
- Leiris, M. (1992) *Manhood: A Journey from Childhood Into the Fierce Order of Virility*. Translated by R. Howard. Chicago: University of Chicago Press.
- Lentricchia, F. (1987) "Patriarchy Against Itself - The Young Manhood of Wallace Stevens", *Critical Inquiry* vol. 13 (summer): 742-86.
- Levi-Strauss, C. (1969) *The Elementary Structures of Kinship*. Boston: Beacon Press.
- (1969) *Totemism*. Translated by R. Needham. Harmondsworth: Penguin.
- Licata, S. and Petersen, R. (eds) (1985) *The Gay Past: A Collection of Historical Essays*. New York: Harrington Park Press.

- Linden, R., Pagano, D., Russell, D. and Star, S. (eds) (1982) *Against Sadomasochism: A Radical Feminist Analysis*. San Francisco: Frog in the Well.
- Lloyd, G. (1984) *The Man of Reason: 'Male' and 'Female' in Western Philosophy*. London: Methuen.
- Longford Committee (1972) *Pornography: The Longford Report*. London: Coronet Books.
- Lord Chancellor's Department (1992) *Court Dress: A Consultation Paper*. London: Lord Chancellor's Department.
- Lukacher, N. (1986) *Primal Scenes: Literature, Philosophy, Psychoanalysis*. Ithaca: Cornell University Press.
- Lyotard, J-J. (1978) "One of the Things at Stake in Women's Struggles", *SubStance* no. 20: 9-17.
- (1984) *The Postmodern Condition: a report on knowledge*. Translated by G. Bennington and B. Massumi. Manchester: Manchester University Press.
- (1988) *The Differend: Phrases in Dispute*. Translated by G. Van Den Abbeele. Manchester: Manchester University Press.
- (1988-9) "Can Thought Go On Without A Body?" *Discourse* vol. 11 no. 1.
- (1990) *Heidegger and "the Jews"*. Translated by A. Michel and M. Roberts. Minneapolis: University of Minnesota Press.
- (1992) *The Inhuman: Reflections on Time*. Cambridge: Polity Press
- MacDonald, S. (1983) "Confessions of a Feminist Porn Watcher", *Film Quarterly* no. 36: 10-17.
- MacLeod, M. and Saraga, E. (1988) "Challenging The Orthodoxy: towards a feminist theory and practice", *Feminist Review* no. 28: 16-55.
- Mackinnon, C. (1987) *Feminism Unmodified: Discourses on Life and Law*. Cambridge, Mass.: Harvard University Press.
- (1989) *Towards A Feminist Theory of The State*. Cambridge: Harvard University Press.
- (1991) "Reflections on Sex Equality Under Law", *Yale Law Journal* vol. 100: 1281-328.
- Maher, P. (ed) (1987) *Child Abuse: The Educational Perspective*. Oxford: Blackwell.
- Maisch, H. (1973) *Incest*. London: Andre Deutsch.
- Malcolm, J. (1984) *In the Freud Archives*. New York: Alfred Knopf.
- Manchester, C. (1991) "A History of the Crime of Obscene Libel", *Journal of Legal History*, vol. 12: 36-57.
- Marcus, S. (1966) *The Other Victorians: a study of sexuality and pornography in mid-nineteenth century England*. London: Weidenfeld and Nicolson.
- Martin, L., Gutman, H. and Hutton, P. (eds) (1988) *Technologies of the Self: A Seminar with Michel Foucault*. London: Tavistock.
- Mason, J. (1981) "1567 And All That", *Scots Law Times Reports*, 18 December, 301-4.
- Masson, J. M. (1984) *Assault on Truth: Freud's Suppression of the Seduction Theory*. New York: Farrar, Straus & Giroux.
- Mauss, M. (1979) *Sociology and Psychology: essays*. Trans. B. Brewster. London: Routledge & Kegan Paul.
- McColgan, M. and Salter M. (1991) "Place of Safety Orders in Northern Ireland: Child Abuse, Law and Practice Issues." Belfast: Social Services Inspectorate.
- McIntosh, M. (1986) "The Homosexual Role", *Social Problems* vol.17, no. 2: 262-70.

- (1988) "Introduction to an Issue: family secrets as public drama", *Feminist Review*, no. 28: 6-15.
- McKenna, A. (1992) *Violence and Difference: Girard, Derrida and Deconstruction*. Urbana: University of Illinois Press.
- McNay, L. (1992) *Foucault and Feminism: power, gender and the self*. Cambridge: Polity.
- McVeigh, S. and Wheeler, S. (eds) (1992) *Law, Health and Medical Regulation*. Aldershot: Dartmouth.
- Meltzer, F. (ed) (1988) *The Trial(s) of Psychoanalysis*. Chicago: Chicago University Press.
- Merck, M. (1992) "From Minneapolis to Westminster", in L. Segal and M. McIntosh (eds) *Sex Exposed: Sexuality and the Pornography Debates*. London: Virago.
- Metcalf, A. and Humphries, M. (eds) (1985) *The Sexuality of Men*. London: Pluto Press.
- Mill, J. (1962) *Utilitarianism*. Edited by M. Warnock. Glasgow: Fontana.
- Miller, A. (1985) *Thou Shalt Not Be Aware: Society's Betrayal of The Child*. London: Pluto Press.
- Miller, D. A. (1989) "Cage Aux Folles: Sensation and Gender in Wilkie Collins's *Woman in White*", in E. Showalter (ed) *Speaking of Gender*, New York: Routledge.
- (1990) "Anal Rope", *Representations* no. 32: 114-33.
- Miller, T. (1988) "Men on Feminism", *Meanjin* vol. 47 no. 1: 117-24.
- Millett, K. (1972) *Sexual Politics*. Great Britain: Abacus.
- Minkinnen, P. (forthcoming) "The Law-Giver's Place: on the unethical quality of legal wisdom", *Social and Legal Studies*.
- Minson, J. (1981) "The Assertion of Homosexuality", *m/f* nos. 5-6: 19-39.
- (1985) *Genealogies of Morals: Nietzsche, Foucault, Donzelot and the Eccentricity of Ethics*. London: Macmillan.
- (1991) "Social Theory and Legal Argument: Catherine MacKinnon on Sexual Harassment", *International Journal of the Sociology of Law*, vol. 19: 355-78.
- Mitchell, J. (1975) *Psychoanalysis and Feminism: A Radical Reassessment of Freudian Psychoanalysis*. Harmondsworth: Penguin.
- Mitchell, J. and Rose, J. (eds) (1982) *Feminine Sexuality: Jacques Lacan and the Ecole Freudienne*. Translated by J. Rose. London: Macmillan.
- Mitchell, W. J. T. (1987) *Iconology: Image, Text, Ideology*. Chicago: Chicago University Press.
- Mitra, C. (1987) "Judicial Discourse in father-daughter incest appeal cases", *International Journal of the Sociology of Law* vol. 15 no.2: 121-48.
- Modleski, T. (1991) *Feminism Without Women: Culture and Criticism in a "Postfeminist" Age*. New York: Routledge.
- Moi, T. (1985) *Sexual/Textual Politics: Feminist Literary Theory*. London: Methuen.
- (ed) (1987) *French Feminist Thought: A Reader*. Oxford: Blackwell.
- Montaigne, M. (1958) *Essays*. Translated by J. Cohen. Harmondsworth: Penguin.
- Montrelay, M. (1977) *L'Ombre et Le Nom*. Paris: Editions de Minuit.
- Moran, L. (1989) "Sexual Fix, Sexual Surveillance: homosexual in law", in S. Shepherd and M. Wallis (eds) *Coming On Strong: gay politics and culture*. London: Unwin Hyman.
- (1989) "Indecent Assault: What Is Indecency", *Liverpool Law Review*, vol. X1, no. 1: 99-109.

- (1990) "A Study in the History of Male Sexuality in Law: non-consummation", *Law and Critique*, vol. 1, no. 2: 155.
- (1991) "The Uses of Homosexuality: homosexuality for national security", *International Journal of the Sociology of Law*, vol. 19: 149-60.
- (forthcoming) "Of Buggery and Its Neologism", *New Formations*.
- (forthcoming) *The Homosexuality of Justice*. London: Routledge.
- Morgan, D. (1990) "'No More Heroes?': Masculinity, Violence and the Civilising Process", in L. Jameson and H. Carr (eds) *State, Private Life and Political Change*. London: Macmillan.
- (1992) *Discovering Men: Sociology and Masculinities*. London: Routledge.
- Morgan, R. (ed) (19) *Sisterhood Is Powerful*.
- Mort, F. (1987) *Dangerous Sexualities: medico-moral politics in England since 1830*. London: Routledge & Kegan Paul.
- Morton, J. (1988) "The Incest Act 1908: was it ever relevant?", *New Law Journal*. 29 January.
- Mouffe, C. (1988) "Radical Democracy: Modern or Postmodern?" in A. Ross (ed) *Universal Abandon? The Politics of Postmodernism*, Minneapolis: University of Minnesota Press.
- Murphy, W. T. (1987) "Memorising Politics of Ancient History", *Modern Law Review* vol. 50: 384-405.
- (1991) "The Oldest Social Science? The Epistemic Properties of the Common Law Tradition", *Modern Law Review* vol. 54, no. 2: 182-215.
- Naffine, N. (1990) *Law and the Sexes: Explorations in Feminist Jurisprudence*. Sydney: Allen & Unwin.
- Nancy, J.-L. (1991) "Lapsus Judicii", *Pli* vol. 3, no. 2: 16-40.
- Nelson, S. (1987) *Incest: Fact and Myth*. Revised edition. Edinburgh: Stramullion Co-operative.
- Neustatter, A. (1986) "The wicked stepfather", *The Guardian*, 10 June, p. 8.
- Newfield, C. (1989) "The Politics of Male Suffering: Masochism and Hegemony in the American Renaissance", *Differences* no.1: 55-87.
- Nicholson, L. J. (ed) (1990) *Feminism/Postmodernism*. New York: Routledge.
- Nietzsche, F. (1966) *Beyond Good and Evil*. Translated by W. Kaufman. New York: Vintage.
- (1968) *The Will To Power*. Translated by W. Kaufman and R. Hollingdale. New York: Vintage.
- (1969) *On the Genealogy of Morals and Ecce Homo*. Translated by W. Kaufman and R. Hollingdale. New York: Vintage.
- (1974) *The Gay Science, with a Prelude in Rhymes and an Appendix of Songs*. Edited and translated by W. Kaufman. New York: Vintage.
- (1989) *Friedrich Nietzsche on Rhetoric and Language*. Edited and translated by S. Gilman, C. Blair and D. Parent. New York: Oxford University Press.
- Oakley, A. (1985) *Sex, Gender & Society*. Aldershot: Gower.
- Oxford Literary Review (1986) Special Issue: *Sexual Difference*. Vol. 8, nos 1-2.
- Ovid (1955) *The Metamorphoses*. Translated by M. Innes. Harmondsworth: Penguin.
- Owens, C. (1985) "The Discourse of Others: feminists and postmodernism", in H. Foster (ed) *Postmodern Culture*. London: Pluto Press.

- Pajaczkowska, C. (1981) "The Heterosexual Presumption: A Contribution to the Debate on Pornography", *Screen* vol. 22: 79-92.
- Parsons, T. (1954) "The Incest Taboo in Relation to Social Structures and the Socialization of the Child", *British Journal of Sociology* vol. 5: 101-7.
- (1956) "Family Structure and the Socialization of the Child", in T. Parsons and R. Bales, *Family: Socialization and Interaction Process*. London: Routledge & Kegan Paul.
- Parton, N. (1985) *The Politics of Child Abuse*. London: Macmillan.
- (1991) *Governing the Family: Child Care, Child Protection and the State*. London: Macmillan.
- Pasquino, P. (1991) "Criminology: the birth of a special knowledge", in G. Burchell et.al. (eds) *The Foucault Effect*. Brighton: Harvester Wheatsheaf.
- Pateman, C. (1988) *The Sexual Contract*. Cambridge: Polity Press.
- Pease, D. (1988) "Patriarchy, Lentricchia, and Male Feminization", *Critical Inquiry* vol. 14.
- Penley, C. and Willis, C. (1989) "Editorial: Male Trouble", *Camera Obscura* vol. 17: 4-5.
- Phelan, S. (1991) "Specificity: Beyond Equality and Difference", *Differences* vol. 3, no. 1: 128-43.
- Pincus, L. and Dare, C. (1980) *Secrets in the Family*. London: Faber and Faber.
- Plato (1906) *Republic*. Translated by H. Spens. London: J. M. Dent & Sons.
- (1951) *The Symposium*. Translated by W. Hamilton. Harmondsworth: Penguin.
- (1971) *Gorgias*. Translated by W. Hamilton. Harmondsworth: Penguin.
- (1973) *Phaedrus and Letters VII and VIII*. Translated by W. Hamilton. Harmondsworth: Penguin.
- Plaza, M. (1978) "'Phallic Power' and the Psychology of 'Woman'", *Ideology and Consciousness* no. 4: 57-76.
- Pleck, J. (1983) *The Myth of Masculinity*. Cambridge, Mass.: MIT Press.
- Pleck, J. and Sawyer, J. (eds) (1974) *Men and Masculinity*. Englewood Cliffs: Prentice Hall.
- Plummer, K. (ed) (1981) *The Making of the Modern Homosexual*. London: Hutchinson.
- (ed) (1992) *Modern Homosexualities: Fragments of Lesbian and Gay Experiences*. London: Routledge.
- Porter, K. and Weeks, J. (eds) (1991) *Between the Acts: Lives of Homosexual Men 1885-1967*. London: Routledge.
- Porter, R. (ed) (1984) *Child Sexual Abuse Within The Family*.
- Posner, R. (1992) *Sex and Reason*. Cambridge: Harvard University Press.
- Power & Politics (1988) Special Issue, no. 3: *Sexual Politics, Feminism and Socialism*.
- Pronger, B. (1990) *The Arena of Masculinity: Sports, Homosexuality, and the Meaning of Sex*. London: Gay Men's Press.
- Radzinowicz, L. (ed) (1957) *Sexual Offences: a report of the cambridge department of criminal science*. London: Macmillan.
- Rajchman, J. (1991) *Truth and Eros: Foucault, Lacan and the Question of Ethics*. New York: Routledge.
- Reik, T. (1962) *Masochism in Sex and Society*. Translated by M. Beigel and G. Kurth. New York: Grove Press.
- Renvoize, J. (1975) *Children in Danger: The Causes and Prevention of Baby Battering*. Harmondsworth: Penguin.

- Report of the Commission on Obscenity and Pornography* (1970). New York: Bantam.
- Report of the Committee on Homosexual Offences and Prostitution* (1957) Cmnd. 247 (chair: J. Wolfenden). London: HMSO
- Report of the Committee on Obscenity and Film Censorship* (1979) Cmnd. 7772 (Chair: B. Williams). London: HMSO.
- Report of the Society For The Suppression of Vice* (1825).
- Report of the Working Group on Publicity for the Prevention of Child Sexual Abuse* (1987). London: HMSO.
- Rhode, D. L. (1989) *Justice and Gender*. Cambridge: Harvard University Press.
- Rhodes, D. and McNeill, S. (eds) (1985) *Women Against Violence Against Women*. London: Onlywomen Press.
- Rich, A. (1980) "Compulsory Heterosexuality and Lesbian Existence", in E. Abel and E. Abel (eds) *The Signs Reader*. Chicago: Chicago University Press.
- Richlin, A. (ed) (1992) *Pornography and Representation in Ancient Greece and Rome*. New York: Oxford University Press.
- Riley, D. (1988) 'Am I That Name?' *Feminism and the Category of 'Women' in History*. London: Macmillan.
- Robbins, B. (1988) "Men in Feminism", *Camera Obscura* vol. 17: 206-14.
- Robel, L. (1989) "Pornography and Existing Law: What the Law Can Do", in S. Gubar and J. Hoff (eds) *For Adult Users Only: The Dilemma of Violent Pornography*. Bloomington and Indianapolis: Indiana University Press.
- Roberts, J. (1988) *German Philosophy: An Introduction*. Cambridge: Polity Press.
- Roberts, R. (1986) "Examination of the anus in suspected child sexual abuse", *The Lancet*, 8 November, 1100.
- Rodowick, D. (1982) "The Difficulty of Difference", *Wide Angle* vol. 5 no. 1: 4-15.
- Rodowick, D. (1992) *The Difficulty of Difference: Psychoanalysis, Sexual Difference and Film Theory*. New York: Routledge.
- Rolph, C.H. (ed) (1990) *The Trial of Lady Chatterley: Regina v Penguin Books Limited*. Thirtieth Anniversary Commemorative Edn. Harmondsworth: Penguin.
- Roper, M. and Tosh, J. (eds) (1991) *Manful Assertions: Masculinities in Britain Since 1800*. London: Routledge.
- Rose, G. (1984) *Dialectic of Nihilism: Post-structuralism and Law*. Oxford: Blackwell.
- Rose, G. (1992) *The Broken Middle: Out of Our Ancient Society*. Oxford: Blackwell.
- Rose, J. (1982) "Introduction - II" in J. Mitchell and J. Rose (eds) *Feminine Sexuality: Jacques Lacan and the Ecole Freudienne*. Translated by J. Rose. London: Macmillan.
- Rosier, N. des (1992) "Overview of Civil Remedies for childhood sexual abuse in Canada", unpublished paper.
- Ross, A. (1989) "The Popularity of Pornography", in A. Ross, *No Respect: Intellectuals and Popular Culture*. London: Routledge.
- Rousseau, J-J (1931) *Confessions, Volumes 1 & 2*. London: J. M. Dent & Sons.
- (1981) *Emile*. Translated by A. Bloom. New York: Basic Books.
- Roustang, F. (1982) *Dire Mastery: Discipleship from Freud to Lacan*. Translated by N. Lukacher. Baltimore: Johns Hopkins University Press.

- Rubin, G. (1975) "The Traffic in Women: Notes on the 'Political Economy' of Sex", in R. Raiter (ed) *Toward an Anthropology of Women*. New York: Monthly Review Press.
- (1984) "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality", in C. Vance (ed) *Pleasure and Danger: Exploring Female Sexuality*. London: Routledge & Kegan Paul.
- Rush, P. (1989) Review of D. Lacombe, in *International Journal of the Sociology of Law*. vol. 17: 103-8.
- (1990) Review of D. A. Downs, in *International Journal of the Sociology of Law*, vol. 18: 264-72.
- (forthcoming) "A Child Is Being Beaten: the indecent image of law", in S. McVeigh, P. Rush and A. Young (eds) *Criminal Legal Practices*. Oxford: Oxford University Press.
- Rutherford, J. (1992) *Men's Silences: Predicaments in Masculinity*. London: Routledge.
- Ryan, M. (1989) *Politics and Culture: Working Hypotheses for a Post-Revolutionary Culture*. London: Macmillan.
- Samois (ed) (1981) *Coming To Power: Writings and Graphics on Lesbian S/M*. Boston: Alyson.
- Sarat, A. and Kearns, T. (eds) (1991) *The Fate of Law*. Ann Arbor: University of Michigan Press.
- Sargent, D. (1983) "Reformulating (Homo) Sexual Politics: radical theory and practice in the gay movement", in J. Allen and P. Patton (eds) *Beyond Marxism? Interventions After Marx*. Leichhardt, Sydney: Intervention Publications.
- Saslow, J. M. (1986) *Ganymede in the Renaissance: Homosexuality in Art and Society*. New Haven: Yale University Press.
- Saunders, D. and Hunter, I. (1991) "Lessons from the 'Literary': How to Historicize Authorship", *Critical Inquiry* vol. 17: 479-509.
- Saunders, I. (1987) "The Concept of Discourse", *Textual Practice* vol. 2 no. 2: 230-41.
- Saussure, F. de (1983) *Course in General Linguistics*. Translated by R. Harris. London: Duckworth.
- Schor, N. (1989) "This Essentialism Which Is Not One: Coming to Grips with Irigaray", *Differences* vol. 1 no. 2.
- Schroeder, J. (1990) "Feminism Historicised: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence", *Iowa Law Review* vol. 75 no. 5: 1135-1217.
- Schwenger, P. (1989) "The Masculine Mode", in E. Showalter (ed) *Speaking of Gender*. New York: Routledge.
- Screen Editorial Collective (ed) (1992) *The Sexual Subject: The Screen Reader in Sexuality*. London: Routledge.
- Sedgwick, E. K. (1985) *Between Men: English Literature and Male Homosocial Desire*. New York: Columbia University Press.
- (1989) "The Beast in the Closet: James and the Writing of Homosexual Panic", in E. Showalter (ed) *Speaking of Gender*. New York: Routledge.
- (1989) "Tide and Trust", *Critical Inquiry*, vol. 15: 745-57.
- (1991) "Jane Austen and the Masturbating Girl." *Critical Inquiry* vol. 17: 818-37.
- (1991) *Epistemology of the Closet*. Hemel Hempstead: Harvester Wheatsheaf.
- Segal, L. (1987) *Is The Future Female? Troubled Thoughts on Contemporary Feminism*. London: Virago.
- (1990) *Slow Motion: Changing Masculinities, Changing Men*. London: Virago.

- Segal, L. and McIntosh, M. (eds) (1992) *Sex Exposed: Sexuality and the Pornography Debates*. London: Virago.
- Seidler, V. (1979) "Men and Feminism", *Achilles Heel* no.2 pp. 32-6.
- (1986) *Kant, Respect and Injustice: the Limits of liberal moral theory*. London: Routledge & Kegan Paul.
- (1987) "Reason, desire and male sexuality", in P. Caplan (ed) *The Cultural Construction of Sexuality*. London: Routledge.
- (1989) *Rediscovering Masculinity: Reason, Language and Sexuality*. London: Routledge.
- (ed) (1991) *The Achilles Heel Reader: Men, Sexual Politics and Socialism*. London: Routledge.
- (1991) *Recreating Sexual Politics: Men, Feminism and Sexual Politics*. London: Routledge.
- (ed) (1992) *Men, Sex and Relationships: Writings from Achilles Heel*. London: Routledge.
- Seidman, S. (1992) *Embattled Eros: Sexual Politics and Ethics in Contemporary America*. London: Routledge
- Selden Society (1955, 1972, 1984) *The Fleta, Books I-IV*. Edited and Translated by G. Sayles. London: Selden Society.
- Sennett, R. (1986) *The Fall of Public Man*. London: Faber and Faber.
- Sennett, R. and Foucault, M. (1982) "Sexuality in Solitude", *Humanities in Review*, vol. 1: 3-21.
- Showalter, E. (ed) (1989) *Speaking of Gender*. New York: Routledge.
- (1989) "The Rise of Gender", E. Showalter (ed) *Speaking of Gender*. New York: Routledge.
- Siebers, T. (1988) *The Ethics of Criticism*. Ithaca: Cornell University Press.
- Silbey, S. (1992) "Making a Place for Cultural Analyses of Law", *Law and Social Inquiry* vol. 17: 39-48.
- Silverman, K. (1980) "Masochism and Subjectivity", *Framework* vol. 12: 2-9.
- (1984) "Histoire d'O: The Construction of a Female Subject", in C. Vance (ed) *Pleasure and Danger: Exploring Female Sexuality*. London: Routledge & Kegan Paul.
- (1984) *The Subject of Semiotics*. New York: Oxford University Press.
- (1988) "Masochism and Male Subjectivity", *Camera Obscura* vol. 17: 31-66.
- (1992) "The Lacanian Phallus", *Differences* vol. 4, no. 1: 84-115.
- (1992) *Male Subjectivity At The Margins*. New York: Routledge.
- Simmel, G. (1984) *On Women, Sexuality and Love*. Edited and translated by G. Oakes. New Haven: Yale University Press.
- Simpson, D. (1982) *Fetishism and Imagination: Dickens, Melville, Conrad*. Baltimore: Johns Hopkins University Press.
- Smart, C. (1989) *Feminism and the Power of Law*. London: Routledge.
- (1992) "The Woman of Legal Discourse", *Social and Legal Studies* vol. 1, no. 1: 29-44.
- (1992) "Unquestionably A Moral Issue: rhetorical devices and regulatory imperatives", in L. Segal and M. McIntosh (eds) *Sex Exposed: Sexuality and the Pornography Debates*. London: Virago.
- Smith, A. M. (1990) "A Symptomology of an Authoritarian Discourse: The Parliamentary Debates on the Prohibition of the Promotion of Homosexuality", *New Formations* no. 10: 41-63.
- Smith, J. and Hogan, B. (1965) *Criminal Law*. 1st edn. London: Butterworths.
- (1992) *Criminal Law*. 7th edn. London: Butterworths.

- Smith, F. (1976) "Labouchere's Amendment to the Criminal Law (Amendment) Act", *Historical Studies* vol. 17 no. 67
- Smith, J. and Kerrigan, W. (eds) (1983) *Interpreting Lacan*. New Haven and London: Yale University Press.
- (eds) (1984) *Taking Chances: Psychoanalysis and Literature*. Baltimore and London: Johns Hopkins University Press.
- Smith, K. J. M. (1991) "Sexual Etiquette, Public Interest and the Criminal Law", *Northern Ireland Legal Quarterly* vol. 42, no. 4: 309-29.
- Smith, P. (1988) "Vas", *Camera Obscura* vol. 17: 89-111.
- Snodgrass, J. (ed) (1977) For Men Against Sexism: a book of readings. California: Times Change Press.
- Soble, A. (1986) *Pornography: Marxism, Feminism, and the Future of Sexuality*. New Haven: Yale University Press.
- Society for the Suppression of Vice (1803, 1804) *Part the First, of An address to the Public*, and *Part the Second*. London.
- South Atlantic Quarterly (1989) Special Issue, vol. 88: *Displacing Homophobia*.
- Spivak, G. (1983) "Displacement and the Discourse of Woman", M. Krupnick (ed) *Displacement: Derrida and After*. Bloomington: Indiana University Press.
- (1984) "Marx After Derrida", in W. Cain (ed) *Philosophical Approaches to Literature: New Essays on Nineteenth and Twentieth Century Texts*. Lewisburg, PA: Bucknell University Press.
- (1985) "Scattered Speculations on the Question of Value", *Diacritics*, winter: 73-93.
- (1987) *In Other Worlds: Essays in Cultural Politics*. New York and London: Methuen.
- (1989) "Feminism and Deconstruction, Again: Negotiating with Unacknowledged Masculinism", in T. Brennan (ed) *Between Feminism and Psychoanalysis*. London: Routledge.
- (1992) "French Feminism Revisited: Ethics and Politics", in J. Butler and J. Scott (eds) *Feminists Theorize the Political*. New York: London.
- Stephen, J. F. (1863) *A General View of the Criminal Law of England*. London: Macmillan.
- (1883) *A History of the Criminal Law of England*. 3 volumes. London: Macmillan.
- (1872) *The Indian Evidence Act, with an introduction to the principles of judicial evidence*. London: Macmillan.
- Stephenson, D. (ed) (1989) *Child Abuse: Professional Practice and Public Policy*. London: Harvester Wheatsheaf.
- Stern, L. (1982) "The Body As Evidence: A Critical Review of the Pornography Debates", *Screen* no. 23: 38-60.
- Stoltenberg, J. (1990) *Refusing To Be A Man*. London: Fontana.
- Stychin, C. F. (1992) "Exploring the Limits: Feminism and the Legal Regulation of Gay Male Pornography", *Vermont Law Review* vol. 16: 859-902.
- Suleiman, S. (ed) (1985) *The Female Body in Western Culture: Contemporary Perspectives*. Cambridge, Mass.: Harvard University Press.
- Sutherland, J. (1982) *Offensive Literature: decensorship in Britain 1960-1982*. London: Junction Books.
- Sutton, R. Jnr. (1992) "Pornography As Persuasion in Attic Pottery", in A. Richlin (ed) *Pornography and Representation in Ancient Greece and Rome*. New York: Oxford University Press.

- Terry, J. (1991) "Theorizing Deviant Historiography", *Differences* vol. 3, no. 2: 55-74.
- Teubner, G. (1989) "How the Law Thinks: Towards a Constructivist Epistemology of Law", *Law and Society Review* vol. 23: 727-57.
- Theweleit, K. (1987, 1989) *Male Fantasies*. 2 vols. Cambridge: Polity.
- Thomas, D. (1969) *A Long Time Burning: the history of literary censorship in England*. New York:
- Thomas, D. (1970) *Principles of Sentencing*. London: Heinemann.
- Tolson, A. (1977) *The Limits of Masculinity*. London: Tavistock.
- Trollope, A. (1923) *An Autobiography*. London: Oxford University Press.
- Tsang, D. (ed) (1981) *The Age Taboo: Gay Male Sexuality, Power and Consent*. London: Gay Men's Press.
- Trumbach, R. (1991) "Sex, Gender and Sexual Identity in Modern Culture: male sodomy and female prostitution in Enlightenment London", *Journal of the History of Homosexuality* vol. 2, no. 2: 186-203.
- Udoff, A. (ed) (1987) *Kafka and the Contemporary Critical Performance*. Minneapolis: University of Minnesota Press.
- Valery, P. (1989) "Some Simple Reflections on the Body", in M. Feher (ed) *Fragments for a History of the Human Body: Part Two*. New York: Zone Books.
- Valverde, M. (1985) *Sex, Power and Pleasure*. Toronto: Women's Press.
- Vance, C. (ed) (1984) *Pleasure and Danger: Exploring Female Sexuality*. London: Routledge.
- Van Leer, D. (1989) "The Beast of the Closet: Homosociality and the Pathology of Manhood", *Critical Inquiry* vol. 15: 587-63.
- Vega, J. (1988) "Coercion and Consent: Classical Liberal Concepts in Texts on Sexual Violence", *International Journal of the Sociology of Law* vol. 16: 75-89.
- Vogler, R. (1990) "Magistrates' Courts and the struggle for local democracy 1886-1986", in C. Sumner (ed) *Censure, Politics and Criminal Justice*. Milton Keynes: Open University Press.
- Vorlicky, R. (1990) "(In)Visible Alliances: Conflicting 'chronicles' of Feminism", in J. Boone and M. Cadden (ed) *Engendering Men: The Question of Male Feminist Criticism*. London: Routledge.
- Walkowitz, J. (1980) *Prostitution and Victorian Society: Women, Class and the State*. New York: Cambridge University Press.
- Ward, E. (1984) *Father-Daughter Rape*. London: Women's Press.
- Warner, W. B. (1989) "Treating Me Like An Object: Reading Catherine MacKinnon's Feminism", L. Kaufmann (ed) *Feminism and Institutions*. Cambridge: Blackwell.
- Wasoff, F. (1980) "What Is Wrong With Incest?", *Scolag Bulletin* vol. 47: 112-5.
- Watney, S. (1987) *Policing Desire: Pornography, AIDS and the Media*. London: Methuen.
- Weeks, J. (1977) *Coming Out: Homosexual Politics in Britain from the Nineteenth Century to the Present*. London: Quartet Books.
- (1985) *Sexuality and Its Discontents: meanings, myths and modern sexualities*. London: Routledge & Kegan Paul.
- (1989) *Sex, Politics and Society: The Regulation of Sexuality Since 1800*. 2nd edn. London: Longman.
- (1990) "Sexuality and History Revisited", in L. Jameson and H. Carr (eds) *State, Private Life and Political Change*. London: Macmillan.
- (1991) *Against Nature: Essays on History, Sexuality and Identity*. London: Rivers Oram Press.

- Welsh, I. (1989) "Marketing Masculinity", unpublished paper.
- West, R. (1988) "Jurisprudence and Gender", *University of Chicago Law Review* vol. 55: 1-72.
- Whitford, M. (1991) *Luce Irigaray: Philosophy in the Feminine*. London: Routledge.
- Whitman, C. (1988) "Law and Sex", *Michigan Law Review* vol. 86: 1388-403.
- Wildeblood, P. (1957) *Against the Law*. Harmondsworth: Penguin.
- Willemen, P. (1978) "Notes on Subjectivity - On Reading 'Subjectivity Under Siege'", *Screen* vol. 19: 41-70.
- (1980) "Letter to John", *Screen* vol. 21, no. 2: 109ff.
- Williams, B. (1985) *Ethics and the Limits of Philosophy*. Cambridge: Harvard University Press.
- Williams, D.G.T. (1964) "Sex and Morals in the Criminal Law, 1954-1963", *Criminal Law Review*, 253-67.
- Williams, G. (1966) "Authoritarian Morals and the Criminal Law", *Criminal Law Review*, 132-47.
- Williams, J. (1989) "Deconstructing Gender", *Michigan Law Review* vol. 87: 797-845.
- Williams, L. (1981) "Film Body: An Implantation of Perversions", *Cine-Tracts* vol. 3 no. 4: 19-35.
- (1989) *Hard Core: Power, Pleasure, and the Frenzy of the Visible*. Berkeley: University of California Press.
- Williamson, D. (1989) "The Novel and Its Neighbours", *Southern Review* vol. 22: 224-43.
- Wills, D. (1988) "Supreme Court", *Diacritics* vol. 18: 20-31.
- Winterton, J. (1987) *The Passion*. London: Bloomsbury.
- Wittgenstein, L. (1968) *Philosophical Investigations*. Oxford: Basil Blackwell.
- Wolfenden, J. (1976) *Turning Points: The Memoirs of Lord Wolfenden*. London: Bodley Head.
- Wolfram, S. (1983) "Eugenics and the Punishment of Incest Act 1908", *Criminal Law Review*, pp. 308-16.
- Winnicott, D. (1961) *Home Is Where We Start From*. Harmondsworth: Penguin.
- Wood, D. (1990) *Philosophy At The Limit*. London: Unwin Hyman.
- (ed) (1992) *Derrida: A Critical Reader*. Oxford: Blackwell.
- Wood, D. and Bernasconi, R. (eds) (1988) *Derrida and Differance*. Evanston, Ill.: Northwestern University Press.
- Woodcock, B. (1984) *Male Mythologies: John Fowles and Masculinity*. Brighton: Harvester Press.
- Young, R. (ed) (1981) *Untying The Text: A Post-structuralist Reader*. London: Routledge & Kegan Paul.
- (ed) (1986) *Sexual Difference*. Special Issue of *Oxford Literary Review* vol. 8, nos. 1-2.
- Zizek, S. (1989) "Looking Awry", *October* no. 50: 31-55.
- (1989) *The Sublime Object of Ideology*. London: Verso.
- (1990) "The Limits of the Semiotic Approach to Psychoanalysis", in R. Feldstein and H. Sussman (eds) *Psychoanalysis And....*. New York: Routledge.
- (1991) *For They Know Not What They Do: Enjoyment as a Political Factor*. London: Verso.

Reports of Legal Decisions

Ashmore v Corporation of Lloyds [1992] 2 All ER 486
 Assistant Recorder of Kingston-Upon-Hull, ex parte Morgan [1969] 1 All ER .
 Boardman v DPP [1974] 3 All ER 440.
 Butler v The Queen [1991] 1 W.W.R 97 [canada].
 Calder and Boyars Ltd [1969] 1 QB 151.
 Case of Edmund Curll, The (1727) 93 E.R. 849.
 Cheeseman v DPP [1991] 2 WLR 1105.
 Chief Constable of Hampshire v Mace (1987) 84 Cr App R 40.
 Cozins (1834) 6 C&P 351.
 Dale v Smith [1967] 2 All ER 1133.
 Daniel Gaston (1981) 73 Cr App R 164.
 DPP v Kilbourne [1973] 1 All ER 440.
 Edington v Fitzmaurice (1885) 29 Chancery Division 459.
 Gerard Joseph Wall (1989) 11 Cr App R (S) 111.
 Jacobellis v Ohio (1964) 378 U.S. 184.
 John Calder Publications v Powell [1965] 1 QB 509.
 Kneller (Publisher, Printing and Promotions) Ltd v DPP [1972] 2 All ER 898.
 Masterson v Holden [1986] 3 All ER 39.
 Peter Charles Willis (1974) Cr App R 146.
 Queen v Hicklin (1868) LR 3 QB 360.
 Queen v Jones and Bowerbank [1896] 1 QB 4.
 R v Brown (1889) 24 QBD 357.
 R v Brown and other appeals [1992] 2 All ER 552.
 R v Burrows [1952] 1 All ER 58.
 R v Carlisle (1845) 1 Cox C.C. 229.
 R v Church and Another, 10 December 1984. Lexis.
 R v Courtie [1984] 1 All ER 740.
 R v Dugdale (1853) Dears 64.
 R v Eagleton (1855) Dears (CC) 376.
 R v Ellis and others (1986) 84 Cr App R 325.
 R v Hall [1963] 2 All ER 1075.
 R v Harris (1971) Cr App R 290.
 R v Hornby and Peaple [1946] 2 All ER (Annotated) 487.
 R v Horwood [1969] 3 All ER 1156.
 R v Hunt and another [1950] 2 All ER 291.
 R v Jacobs (1817) Russ & Ry 331 (CCR).
 R v King [1967] 1 All ER 379.
 R v Lemon [1979] AC 617.
 R v Martin Secker Warburg Ltd [1954] 2 All ER 683.
 R v O'Sullivan and others, 27 February 1981. Lexis.
 R v P [1991] 3 All ER 337.
 R v P [1991] Crim LR 291.
 R v Pearce [1951] 1 All ER 493.
 R v Reakes [1974] Crim LR 615.
 R v Robbins [1988] Crim LR 752.
 R v Gibson, R v Sylveire [1990] 3 WLR 595.
 R v Warn [1968] 1 All ER 339.
 R v Warn [1968] 2 All ER 300.
 R v Young [1990] Crim LR 752.
 Reekspear (1832) 1 Mood (CC) 357.
 Rex v Crunden (1809) 2 Camp. 89.
 Rex v Dixon 3 M & S 11.
 Rex v Vantandillo 4 M & S 73.

Shaw v DPP [1961] 2 All ER 463.
Steel v Brannen (1872) The Law Times (New Series) XXVI 509.
Steele v Brannan (1872) The Law Reports (C.P.) VII 261.
Thomas Courtie (1983) 77 Cr App R 252.
Thompson v DPP [1918-19] All ER 521.
Trial of Lord Audley, The. State Trials, 402-18.

Miscellaneous Newsletters

The following newsletters and magazines were consulted during the research.

Achilles Heel
Contact Magazine
Anti-Sexist Men's Newsletter
Brothers Against Sexism
Men For Change